

Steering Committee Final Draft

The Model Procurement Code Revision Project

a Joint Program
to
Improve State and Local Procurement

Sponsored by

**The American Bar Association's
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**Massachusetts Institute of Technology
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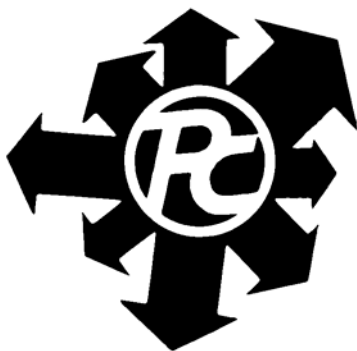


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ARTICLE 1-GENERAL PROVISIONS

Part A-Purposes, Construction, and Application

§1-101 Purposes, Rules of Construction.

(1) *Interpretation.*

This Code shall be construed and applied to promote its underlying purposes and policies.

(2) *Purposes and Policies.*

The underlying purposes and policies of this Code are:

- (a) to simplify, clarify, and modernize the law governing procurement by this [State];
- (b) to permit the continued development of procurement policies and practices;
- (c) to make as consistent as possible the procurement laws among the various jurisdictions;
- (d) to provide for increased public confidence in the procedures followed in public procurement;
- (e) to ensure the fair and equitable treatment of all persons who deal with the procurement system of this [State];
- (f) to provide increased economy in [State] procurement activities and to maximize to the fullest extent practicable the purchasing value of public funds of the [State];
- (g) to foster effective broad-based competition within the free enterprise system;
- (h) to provide safeguards for the maintenance of a procurement system of quality and integrity, and
- (i) to obtain in a cost-effective and responsive manner the materials, services, and construction required by [State] agencies in order for those agencies to better serve this [State's] businesses and residents.

COMMENTARY:

These broad policies outline the general rationale for the promulgation of this Code but are in no way to be interpreted as limiting either its provisions or application. This Code is intended to simplify, clarify, and modernize [State] procurement, as well as to increase the confidence of both the persons who deal with the procurement system and the general public in the procurement activities of the [State]. The 2000 edition of the Code adds subparagraph (i), which is adapted from the statutes of Arizona, at Laws 1984, Ch 251 §1 as amended.

(3) *Singular-Plural and Gender Rules.*

In this Code, unless the context requires otherwise:

- (a) words in the singular number include the plural, and those in the plural include the singular; and

- (b) words of a particular gender include any gender and the neuter, and when the sense so indicates, words of the neuter gender may refer to any gender.

§1-102 Supplementary General Principles of Law Applicable.

Unless displaced by the particular provisions of this Code, the principles of law and equity, including the Uniform Commercial Code of this State, the law merchant, and law relative to capacity to contract, agency, fraud, misrepresentation, duress, coercion, mistake, or bankruptcy shall supplement the provisions of this Code.

§1-103 Requirement of Good Faith.

This Code requires all parties involved in the negotiation, performance, or administration of [State] contracts to act in good faith.

§1-104 Application of this Code.

- (1) *General Application.*

This Code applies only to contracts solicited or entered into after the effective date of this Code unless the parties agree to its application to a contract solicited or entered into prior to the effective date.

COMMENTARY:

This Code would not retroactively affect rights and remedies under existing contracts.

- (2) *Application to [State] Procurement.*

This Code shall apply to every expenditure of public funds irrespective of their source, including federal assistance monies except as otherwise specified in Section 11-301 (Compliance with Federal Requirements), by this [State], acting through a governmental body as defined herein, under any contract, except that this Code shall not apply to either grants, or contracts between the [State and its political subdivisions] or other governments, except as provided in Article 10 (Intergovernmental Relations). It shall also apply to the disposal of [State] supplies. Nothing in this Code or in regulations promulgated hereunder shall prevent any governmental body or political subdivision from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.

COMMENTARY:

The last sentence of this Section enables the [State] to comply with conditions contained in gifts, bequests, or agreements between the [State] and a private party (for example, a lessee) specifying requirements for the design, location, construction, or utilization of facilities, including industrial development facilities.

[ALTERNATIVE A]

- (3) *Application to Political Subdivisions and Other Local Public Agencies.*

[OPTION 1]

This Code and the State Procurement Regulations shall apply to all political subdivisions and other local public agencies of this State except that the [Policy Office] [Chief Procurement Officer] may permit optional use of selected portions of the regulations.

[OPTION 2]

The following Sections of this Code and regulations pertaining thereto, as indicated below, shall apply to all political subdivisions and other local public agencies of this State:

[The enacting jurisdiction should list here those Sections of this Code to be applicable at the local government level.]

Any other Section of this Code or its regulations may be adopted by any political subdivision or other local public agency at its discretion.

COMMENTARY:

(1) It is recognized that compliance with some provisions of this Code may be beyond the capacity of many local governments. Thus, Option 2 would allow the State to selectively apply those Sections which are basic to the procurement function rather than organizational in nature. Specifically, it is recommended that should Option 2 be adopted, the basic provisions of Article 3 (Source Selection and Contract Formation), Article 4 (Specifications), Article 5 (Procurement of Infrastructure Facilities and Services), Article 6 (Modification and Termination of Contracts for Supplies and Services), Article 7 (Cost Principles), Article 9 (Legal and Contractual Remedies), and Article 12 (Ethics in Public Contracting) be considered for possible application to political subdivisions and other local public agencies.

(2) Full application of this Alternative may cause unfunded mandates as defined elsewhere in State law. In the event of such a situation, Alternative B should be adopted.

[END OF ALTERNATIVE A]

[ALTERNATIVE B]

(3) Political Subdivisions and Other Local Public Agencies Authorized to Adopt this Code.

All political subdivisions and other local public agencies of this State are authorized to adopt all or any part of this Code and its accompanying regulations.

COMMENTARY:

(1) Alternatives A and B should be considered in the context of the State's constitutional and statutory provisions with respect to home rule. Alternative A's imposition of Code provisions on local governments may be inconsistent with broad grants of home rule powers.

(2) It is intended that the terms "political subdivisions" and "other local public agencies" cover all types of units or organizations created by State and local governments.

(3) It should also be noted that if either Option I or Option 2 under Alternative A is enacted, various sections of this Code will have to be adjusted to name appropriate local officials to enter contracts, give approvals, raise objections, and the like.

[END OF ALTERNATIVE B]

§1-105 Severability.

If any provision of this Code or any application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of this Code which can be given effect without the invalid provision or application, and to this end the provisions of this Code are declared to be severable.

§1-106 Specific Repealer.

The following acts and all other acts and parts of acts inconsistent herewith are hereby repealed:

[The enacting jurisdiction must list each act or section of any act that is specifically repealed.]

§1-107 Specific Amender.

The following acts and all other acts and parts of acts inconsistent herewith are hereby amended:

[The enacting jurisdiction must list each act or section of any act that is specifically amended.]

§1-108 Construction Against Implicit Repealer.

Since this Code is a general act, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction of the subsequent legislation can be reasonably avoided,

§1-109 Effective Date.

This Code shall become effective at 12:01 A.M. on [_____], 20[____].

COMMENTARY:

The effective date of this Code should be set at least six months after enactment to allow adequate time for development of regulations and the other administrative matters necessitated by its enactment.

Part B Determinations

§1-201 Determinations.

Written determinations required by this Code shall be retained in the appropriate official contract file of the Chief Procurement Officer or the Purchasing Agency.

COMMENTARY:

This provision is unchanged, but noted here because the new definition of “written or in writing” in Section 1-301(26) will permit determinations to be issued electronically. As procurement processes involve more electronic transmissions, the [Policy Office] [Chief Procurement Officer] may issue regulations concerning the retention and form of procurement and contract files.

Part C-Definitions of Terms Used in this Code

§1-301 Definitions.

The words defined in this Section shall have the meanings set forth below whenever they appear in this Code, unless:

- (a) the context in which they are used clearly requires a different meaning; or
- (b) a different definition is prescribed for a particular Article or provision.
 - (1) *Business* means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity.
 - (2) *Change Order* means a written order signed by the Procurement Officer, directing the contractor to make changes which the Changes clause of the contract authorizes the Procurement Officer to order without the consent of the contractor.

COMMENTARY:

This definition does not preclude the Procurement Officer from seeking the consent of a contractor to a change order.

- (3) *Chief Procurement Officer* means the person holding the position created in Section 2-201 (Creation of the Office of the Chief Procurement Officer), as the head of the central procurement office of the [State].

COMMENTARY:

Should the enacting jurisdiction desire to call this official by some other title, it should substitute that title for “Chief Procurement Officer” wherever such term appears in this Code and its implementing regulations.

- (4) *Construction* means the process of building, altering, repairing, improving, or demolishing any public infrastructure facility, including any public structure, public building, or other public improvements of any kind to real property. It does not include the routine operation, routine repair, or routine maintenance

of any existing public infrastructure facility, including structures, buildings, or real property.

COMMENTARY:

The 2000 version of the Code expands the definition of construction to include any “public infrastructure facility” defined in Section 5-101(8). The revised definition preserves the statutory distinctions between operation and maintenance, which involves routine services; and construction, which is intended to apply to nonroutine activities.

- (5) *Contract* means all types of [State] agreements, regardless of what they may be called, for the procurement or disposal of supplies, services, or construction.

COMMENTARY:

Collective bargaining agreements between the enacting jurisdiction and its employees are excluded from coverage under this Code by the definition of “services.” See Subsection 21 of this Section.

- (6) *Contract Modification* means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract.

COMMENTARY:

The new definition of “written or in writing” in Section 1-301(26) will permit determinations to be issued electronically.

- (7) *Contractor* means any person having a contract with a governmental body.
- (8) *Data* means recorded information, regardless of form or characteristic.
- (9) *Designee* means a duly authorized representative of a person holding a superior position.
- (10) *Electronic* means electrical, digital, magnetic, optical, electromagnetic, or any other similar technology.

COMMENTARY

(1) The purpose of this definition is to facilitate the use of electronic documents of all types. The Code does not attempt to anticipate the specific technologies that may allow the procurement process to be performed electronically, but provides the [Chief Procurement Officer] [Policy Office] with the necessary flexibility to adopt regulations that do so.

(2) The implementation of electronic procurement processes should include sound system checks and balances that demonstrate a high level of accountability and integrity. The key to public and vendor confidence in the procurement system is the existence of reliable records as to how procurement decisions are made. Records, either electronic or paper, that are sufficient to document decisions must be created and maintained.

- (11) *Employee* means an individual drawing a salary from a governmental body, whether elected or not, and any noncompensated individual performing personal services for any governmental body.
- (12) *Governmental Body* means any department, commission, council, board, bureau, committee, institution, legislative body, agency, government corporation, or other establishment or official of the executive, legislative, or judicial branch of this [State].
- (13) *Grant* means the furnishing by the [State] of assistance, whether financial or otherwise, to any person to support a program authorized by law. It does not include an award whose primary purpose is to procure an end product, whether in the form of supplies, services, or construction; a contract resulting from such an award is not a grant but a procurement contract.
- (14) *May* denotes the permissive.

- (15) *Person* means any business, individual, union, committee, club, other organization, or group of individuals.
- (16) *Procurement* means buying, purchasing, renting, leasing, or otherwise acquiring any supplies, services or construction. It also includes all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.
- (17) *Procurement Officer* means any person duly authorized to enter into and administer contracts and make written determinations with respect thereto. The term also includes an authorized representative acting within the limits of authority.
- (18) *Public Notice* means the distribution or dissemination of information to interested parties using methods that are reasonably available. Such methods will often include publication in newspapers of general circulation, electronic or paper mailing lists, and web site(s) designated by the [State] and maintained for that purpose.

COMMENTARY:

This is a new definition. Because the adequacy of notice will, as a practical matter, vary from locality to locality and procurement to procurement, no attempt is made to define statutorily either a prescribed method of public notice or the duration of its publication. However, the implementing regulations should provide criteria and general guidelines for the method and duration of public notice. Electronic dissemination of notice is specifically contemplated by the new definition.

- (19) *Purchasing Agency* means any governmental body other than the Chief Procurement Officer which is authorized by this Code or its implementing regulations, or by way of delegation from the Chief Procurement Officer, to enter into contracts.
- (20) *Regulation* means a governmental body's statement, having general or particular applicability and future effect, designed to implement, interpret, or prescribe law or policy, or describing organization, procedure, or practice requirements, which has been promulgated in accordance with the [Administrative Procedure Act].
- (21) *Services* means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term shall not include employment agreements or collective bargaining agreements.

COMMENTARY:

This definition of "services" includes, but is not limited to, consulting, personal, professional, technical, and purchase-of-client services.

- (22) *Shall* denotes the imperative.
- (23) *Signature* means [enter the appropriate reference to the State's applicable Digital Signature Act if enacted] [a manual or electronic identifier, or the electronic result of an authentication technique attached to or logically associated with a record that is intended by the person using it to have the same force and effect as a manual signature.]

COMMENTARY:

(1) The purpose of this definition is to permit the acceptance of an electronic signature that is consistent with the [State's] [Electronic or Digital Signature Act] or [current legislation regarding the use of such technology]. In the absence of legislation on digital signatures, the Code offers a definition adapted from definitions of "electronic signature" adopted across the country. A review of emerging technologies indicates that digital signatures may emerge as the equivalent of manual signatures, provided that three key tests are met: (a) sender authentication (verification of the sender, typically through verification of a certificate identifying the sender); (b) message integrity (confirmation that the message or signature was properly received in the original format of the sender); and (c) nonrepudiation (confirmation that the Sender cannot deny the message or signature was sent).

(2) In defining the term "signature," the intent of the Code is to protect the integrity of the procurement process and to ensure that the transmission and receipt of information concerning public solicitations is accurate and reliable.

(24) *Supplies* means all property, including but not limited to equipment, materials, printing, insurance, and leases of real property, excluding land or a permanent interest in land.

(25) *Using Agency* means any governmental body of the [State] which utilizes any supplies, services, or construction procured under this Code.

(26) *Written or In Writing* means the product of any method of forming characters on paper, other materials, or viewable screens, which can be read, retrieved, and reproduced, including information that is electronically transmitted and stored.

COMMENTARY:

This definition is a combination of definitions of "written" or "in writing" found in the U.S. Code of Federal Regulations (CFR 48 CFR 2.101) and in the Florida Electronic Signature Act of 1996 (F.S.A. §282.72(4)). These definitions are similar to a number of other States' definitions. The fact that "digital signatures" are currently in vogue does not mean that this technology will ultimately prove to be the most appropriate means of data transfer or communication for procurement purposes. The intent of the revisions to the Code is to authorize the responsible use of technological developments in electronic writings and signatures as they occur.

SUMMARY DEFINITIONAL CROSS-REFERENCES:

"Architectural and Engineering Services"	Section	5-101(1)
"Blind Trust"	Section	12-101(1)
"Confidential Information"	Section	12-101(2)
"Conspicuously"	Section	12-101(3)
"Cooperative Purchasing"	Section	10-101(1)
"Cost-Reimbursement Contract"	Section	3-101(1)
"Design-bid-build"	Section	5-101(2)
"Design-build"	Section	5-101(3)
"Design-build-finance-operate-maintain"	Section	5-101(4)
"Design-build-operate -maintain"	Section	5-101(5)
"Design Requirements"	Section	5-101(6)
"Direct or Indirect Participation"	Section	12-101(4)
"Disadvantaged Business"	Section	11-101(1)
"Established Catalogue Price"	Section	3-101(2)
"Excess Supplies"	Section	8-101(1)
"Expendable Supplies"	Section	8-101(2)
"External Procurement Activity"	Section	10-101(2)
"Financial Interest"	Section	12-101(5)
"Gratuity"	Section	12-101(6)
"Immediate Family"	Section	12-101(7)
"Independent Checking Engineer"	Section	5-101(7)
"Infrastructure Facility"	Section	5-101(8)
"Invitation for Bids"	Section	3-101(3)
"Local Public Procurement Unit"	Section	10-101(3)
"Non-expendable Supplies"	Section	8-101(3)
"Official Responsibility"	Section	12-101(8)
"Operations and Maintenance"	Section	5-101(9)
"Proposal Development Documents"	Section	5-101(10)
"Public Procurement Unit"	Section	10-101(4)
"Purchase Description"	Section	3-101(4)

"Purchase Request"	Section	12-101(9)
"Request for Proposals"	Section	3-101(5)
"Responsible Bidder or Offeror"	Section	3-101(6)
"Responsive Bidder"	Section	3-101(7)
"Small Business"	Section	11-101(2)
"Specification"	Section	4-101(1)
"State Public Procurement Unit"	Section	10-101(5)
"Surplus Supplies"	Section	8-101(5)

Part D-Public Access

§1-401 Public Access to Procurement Information.

Procurement information shall be a [public record] to the extent provided in [cite appropriate statute] and shall be available to the public as provided in such statute.

COMMENTARY:

- (1) The purpose of this provision is to achieve maximum public access to procurement information consistent with appropriate consideration of safeguards for contractors and employees.
- (2) The appropriate statute to cite in this Section is the State Freedom of Information Act or similar open records law. The words "public record" have been bracketed to connote that, where the cited public access statute uses a term other than "public record," that term should be substituted. This provision does not define "public record" or "public access" but rather incorporates the standards set forth in the State's public access statute. Therefore, this Section is not appropriate for States without such statutes.

§1-501 Authorization for the Use of Electronic Transmissions.

The use of electronic media, including acceptance of electronic signatures, is authorized consistent with the [State's] applicable statutory, regulatory or other guidance for use of such media, so long as such guidance provides for:

- (a) appropriate security to prevent unauthorized access to the bidding, approval, and award processes; and
- (b) accurate retrieval or conversion of electronic forms of such information into a medium which permits inspection and copying.

ARTICLE 2-PROCUREMENT ORGANIZATION

[ALTERNATIVE A]

Part A- [State] Procurement Policy Office

§2-101 Creation and Membership of the [State] Procurement Policy Office.

(1) Creation of the [State] Procurement Policy Office.

There is hereby created in the [executive branch of this State] [Department of ____] the [State] Procurement Policy Office which is referred to hereinafter as the Policy Office.

COMMENTARY:

(1) Some jurisdictions prefer to separate procurement policymaking and operational functions, so this Part A offers this language which establishes a [State] Procurement Policy Office to perform the former duties. The original Code did not designate this Part as an alternative. The American Bar Association still recommends that jurisdictions separate policymaking and operations. However, the 2000 edition of the Code recognizes that [States] may elect not to create a Policy Office under Section 2-101, and instead to vest this power in the Chief Procurement Officer. The 2000 Code revisions contemplate that approach as an additional alternative to provide leadership in the procurement policymaking function without creating a separate board. See the revisions to Section 2-204 (Authority of the Chief Procurement Officer).

(2) The separation of policymaking and operational functions can be achieved through the establishment of an independent policy body such as the Policy Office. This Section provides for placement of the Policy Office either as an independent entity within the executive branch of the government or within an existing department of government such as General Services, Finance, or Administration. Placement in the executive branch as a separate entity is the preferred arrangement as it would further ensure the professional integrity of this important policymaking body, and appropriately elevate the entire procurement process in the public sector.

(3) While the American Bar Association endorses the separation of policymaking and operational functions, few States adopting versions of the Code have embraced this approach. A Policy Office may require an additional administrative body requiring support and staffing. Combining the two functions eliminates the need for separate administration. Additionally, those States that have eliminated boards or commissions as overseers of administrative agencies may view the creation of the Policy Office as a step back in that direction. The 2000 Code has been revised to offer enacting jurisdictions a choice of management approaches.

[OPTION 1]

(2) *Membership of the Policy Office (Outside Board).*

The Policy Office shall consist of a board of (three) members who shall not otherwise be full-time employees of the [State], and who shall be appointed by the [Governor] [and confirmed by the Senate]. The Chief Procurement Officer shall serve as an ex officio member of the Policy Office. Each appointed member shall have demonstrated sufficient business or professional experience to discharge the functions of the Policy Office. The term of office of each member shall be [six] years, except that in making the initial appointments the [Governor] shall appoint one member for a term of [two] years, one member for a term of [four] years, and one member for a term of [six] years, so that the term of one member shall expire every [two] years. Members may be reappointed for succeeding terms. The chairperson shall be appointed by the [Governor] [and confirmed by the Senate]. No member of the Policy Office shall be eligible for appointment as the Chief Procurement Officer. Members of the Policy Office may receive compensation for services as provided by law and shall be reimbursed for any expenses reasonably incurred in the performance of their duties. The members of the Policy Office shall devote such time to their duties as may be necessary for the proper discharge thereof.

[END OF OPTION 1]

[OPTION 2]

(2) *Membership of the Policy Office (Inside Board).*

The Policy Office shall consist of two cabinet or elected [State] officials, appointed by the [Governor], in addition to the [Director of General Services, or Commissioner of the Department of Finance or the Department of Administration], who shall serve as chairperson. No member of the Policy Office shall act concurrently as the Chief Procurement Officer. The Chief Procurement Officer shall serve as an ex officio member of the Policy Office.

[END OF OPTION 2]

COMMENTARY:

- (1) Section 2-101 provides one option for centralizing procurement policymaking in a single Policy Office. Two different options for doing so are presented. Under either option, the Chief Procurement Officer should be added as an ex officio member of the Policy Office to provide continuity between the policymaking and operational functions.
- (2) Option 1 provides for the establishment of an "outside" procurement board which is to be composed of private citizens.
- (3) Option 2 provides for an "inside" board, centralizing procurement policymaking in a group of high-level officials. In some jurisdictions, experience has indicated that a high-level official such as the Commissioner of Administration or Finance, or Director of General Services is able to provide assistance to the Chief Procurement Officer in terms of communicating with political policymakers and other high-level administrative officials on such matters as budget, personnel, and staffing. The requirements provided in Section 2-201 (Creation of the Office of the Chief Procurement Officer) that the Chief Procurement Officer be a highly qualified, career official, with a relatively long term and otherwise removable only for cause, further assures the independence and integrity of procurement operations.
- (4) The two structures set out above can be combined to form a "mixed" board, whereby a citizen board, such as provided in Option 1, could be chaired by a high-level official and administratively housed in that official's department.
- (5) A fourth organizational structure is to provide that a single public official, such as the Director of General Services, or the Commissioner of Finance or Administration, shall assume the duties of the Policy Office.
- (6) In deciding among the various forms of organization; the following considerations are relevant:
 - (a) the need for continuity of membership;
 - (b) the capacity for carrying out the responsibilities of the Policy Office;
 - (c) the need for prompt and efficient action;
 - (d) the independence and accountability of the Policy Office; and
 - (e) the comparative administrative expenses involved.
- (7) Where the organizational structure requires appointment of persons to the Policy Office, such appointments should be made in accordance with existing law and such persons may be compensated in accordance with law.

(3) *Administrative Support.*

The [insert appropriate executive agency] is authorized to provide such services as the Policy Office may request, on such basis, reimbursable or otherwise, as may be agreed upon between the [insert appropriate executive agency] and the Policy Office.

§2-102 Authority and Duties of the Policy Office.

Except as otherwise provided in this Code, the Policy Office shall have the authority and responsibility to promulgate regulations, consistent with this Code, governing the procurement, management, control, and disposal of any and all supplies, services, and construction to be procured by the [State]. The Policy Office shall promulgate the regulations according to Part D of this Article. The Policy Office shall consider and decide matters of policy within the provisions of this Code. The Policy Office shall have the power to audit and monitor the implementation of its regulations and the requirements of this Code, but shall not exercise authority over the award or administration of any particular contract, or over any dispute, claim, or litigation pertaining thereto.

COMMENTARY:

- (1) This Section is designed to give the Policy Office broad authority to promulgate regulations, except as otherwise expressly provided in this Code. There are two such exceptions. Article 9 (Legal and Contractual Remedies) provides an option for the establishment of a Procurement Appeals Board, which would have the power to adopt its own rules of procedure under Section 9-503 (Rules of Procedure), Article 12 (Ethics in Public Contracting) provides for the creation of an Ethics Commission with broad power to promulgate regulations designed to implement the provisions of Article 12.
- (2) Examples of the type of regulations that may be promulgated by the Policy Office include:
 - (a) conditions and procedures for delegations of procurement authority;

- (b) pre-qualification, suspension, debarment, and reinstatement of prospective bidders and contractors;
- (c) small purchase procedures;
- (d) conditions and procedures for the procurement of perishables and items for resale;
- (e) conditions and procedures for the use of source selection methods authorized by this Code, including emergency procurements;
- (f) the opening or rejection of bids and offers, and waiver of informalities in bids and offers;
- (g) confidentiality of technical data and trade secrets submitted by actual or prospective bidders or offerors;
- (h) partial, progressive, and multiple awards;
- (i) supervision of storerooms and inventories, including determination of appropriate stock levels and the management, transfer, sale, or other disposal of publicly owned supplies;
- (j) definitions and classes of contractual services and procedures for acquiring them;
- (k) regulations providing for conducting price analysis;
- (l) use of payment and performance bonds in connection with contracts for supplies and services; and
- (m) guidelines for use of cost principles in negotiations, adjustments, and settlements.

The Policy Office may also adopt such other regulations as it may deem desirable to carry out the provisions of this Code, such as regulations applicable to cooperative purchasing agreements between the enacting jurisdiction and other jurisdictions. This Section is not, however, intended to give the Policy Office power to promulgate regulations governing management and operation of Using Agencies.

(3) Implicit in the Policy Office's power to promulgate regulations is the power to adopt procedural rules for its own internal operations. In States which adopt both the Policy Office and the Office of the Chief Procurement Officer, the Policy Office should not, however, adopt operational procedures governing the Office of the Chief Procurement Officer.

[END OF ALTERNATIVE A]

Part B - Chief Procurement Officer

§2-201 Creation of the Office of the Chief Procurement Officer.

There is hereby created an Office of the Chief Procurement Officer, headed by the Chief Procurement Officer.

COMMENTARY:

Periodic surveys of the National Association of State Procurement Officials indicate that, in many States, statutes assign the duties of the Chief Procurement Officer to the Director of General Services, the Secretary of Administration or a similar official. In such cases, statutes assigning those duties should ensure that any official to whom such duties are assigned has plenary authority over the State's procurement system, including or similar to the duties and authorities set forth in this Part for the Chief Procurement Officer.

§2-202 Appointment and Qualifications.

The [Policy Office] [Governor] shall appoint the Chief Procurement Officer. The Chief Procurement Officer shall have relevant, recent experience in public procurement and in the large-scale procurement of supplies, services, or construction, and shall be a person with demonstrated executive and organizational ability.

COMMENTARY:

This Section has been revised from the 1979 Code. Language specifying a required number of years of experience, acquired within a specific number of years before the date of appointment, has been removed to eliminate artificial barriers to hiring the best-qualified individuals.

§2-203 Tenure, Removal, and Compensation.

- (1) *Tenure and Removal.* The Chief Procurement Officer shall be a full-time public official of the [State] [appointed to serve a term of [ten] years] and may be removed from office by the [Governor] [Policy Office] only upon a showing of just cause.
- (2) *Compensation.* The Chief Procurement Officer shall be compensated as provided by law.

COMMENTARY:

- (1) As the principal official responsible for all procurement actions and for the handling of large sums of the taxpayers' monies, the Chief Procurement Officer should be compensated by a salary sufficient to attract and retain a person with the requisite technical skills and professional ability.
- (2) In some jurisdictions, the Chief Procurement Officer is a classified employee. In those cases, the language under this Section, and under Section 2-202, should be altered to properly recognize that status.

§2-204 Authority of the Chief Procurement Officer.

- (1) *Principal Contracting Officer of the [State].*

The Chief Procurement Officer shall serve as the central procurement officer of the [State].

- (2) *Power to Adopt Operational Procedures.*

Consistent with the provisions of this Code, the Chief Procurement Officer may adopt operational procedures governing the internal functions of the Office of the Chief Procurement Officer.

- (3) *Duties.*

Except as otherwise specifically provided in this Code, the Chief Procurement Officer shall, in accordance with regulations:

- (a) procure or supervise the procurement of all supplies, services, and construction needed by the [State];
- (b) exercise general supervision and control over all inventories of supplies belonging to the [State];
- (c) sell, trade, or otherwise dispose of surplus supplies belonging to the [State];
- (d) establish and maintain programs for the inspection, testing, and acceptance of supplies, services, and construction; and
- (e) ensure compliance with this Code and implementing regulations by reviewing and monitoring procurements conducted by any designee, department, agency or official delegated authority under Section 2-205 (Delegation of Authority by the Chief Procurement Officer).

[ALTERNATIVE B - NO POLICY OFFICE]

- (4) *Regulations.*

The Chief Procurement Officer is authorized to adopt regulations, consistent with the Code, governing the procurement, management, control, and disposal of any and all supplies, services and construction procured by the [State], unless exempted pursuant to Section 2-303.

COMMENTARY:

Subsection (4) should be adopted if the enacting jurisdiction does not create a Policy Office under Sections 2-101 and 2-102, or otherwise separate policymaking from operational responsibilities.

[END OF ALTERNATIVE B]

§2-205 Delegation of Authority by the Chief Procurement Officer

Subject to regulations, the Chief Procurement Officer may delegate authority to designees or to any department, agency, or official.

Part C-Organization of Public Procurement

§2-301 Centralization of Procurement Authority

Except as otherwise provided in this Part, all rights, powers, duties, and authority relating to the procurement of supplies, services, and construction, and the management, control, warehousing, sale, and disposal of supplies, services, and construction now vested in, or exercised by, any [State] governmental body under the several statutes relating thereto are hereby transferred to the Policy Office or the Chief Procurement Officer, as provided in this Code.

COMMENTARY:

State and local public procurement systems are the means through which critical and strategic services, supplies and construction are purchased to support essential public functions. To operate effectively, it is imperative in those systems that there be central leadership to provide direction and cohesion. The Code's drafters, in creating a central procurement official, do not intend to promote the idea that the day-to-day procurement functions must be performed directly out of the central office. It is expected that the Chief Procurement Officer will freely delegate his or her authority, as provided in Section 2-205, considering the following factors:

- (a) the expertise of the potential delegate in terms of procurement knowledge and any specialized knowledge pertinent to the authority to be delegated;
- (b) the past experience of the potential delegate in exercising similar authority;
- (c) the degree of economy and efficiency to be achieved in meeting the [State's] requirements if authority is delegated;
- (d) the available resources of the Office of the Chief Procurement Officer to exercise the authority if it is not delegated, and the consistency of delegation under similar circumstances.

§2-302 Authority to Contract for Legal Services.

No contract for the services of legal counsel may be awarded without the approval of [such officer as may be required by applicable law].

COMMENTARY:

- (1) The original Code contained Subsection (1) that authorized any governmental body to act as a Purchasing Agency concerning the purchase of certain services. Examples of services in the Code's statutory text were accountants, clergy, physicians, lawyers, and dentists. That Subsection reflected the fact that, at the time the Code was approved in 1979, many State and local governments exempted certain professional services from central oversight and, in some cases, from any procurement procedures whatsoever. Today, State and local governments purchase far greater services than they did twenty years ago, and the services being purchased are much more complex. Since contracting for services can be one of the most difficult types of public procurement, there should not be a "blanket" exemption from central purchasing oversight and the assistance of purchasing professionals. The Chief Procurement Officer should delegate procurement authority to any governmental body whose purchasing staff is qualified to conduct complex service procurements under the various source selection methods set forth in Article 3 and Article 5 of this Code.
- (2) Many States, by statute, direct the Attorney General to provide legal services for the State. State statutes also define what agencies other than the Attorney General can employ counsel, or whether the Attorney General or the Governor, or both, must approve such decisions.

[OPTIONAL PART]**§2-303 Exemptions.**

Unless otherwise ordered by regulation, with approval of the [Governor], the following supplies, services, and construction need not be procured through the Office of the Chief Procurement Officer, but shall nevertheless be procured by the appropriate Purchasing Agency subject to the requirements of this Code and the regulations:

- [(a) the design, construction, maintenance, operation, and private finance of bridge, highway, water, waste water, or other heavy or specialized infrastructure facility or service, as defined in Section 5-101 of this Code;
- (b) works of art for museum and public display;
- (c) published books, maps, periodicals, and technical pamphlets.]

COMMENTARY:

Each State adopting the Code has chosen to exempt certain types of procurements from centralized coverage. This provision shows a jurisdiction adopting the Code where exemptions should be enumerated. As stated in the original commentary to this Section, extensive delegation of procurement authority, based on an agency's expertise and capabilities, is preferable to "across the board" exemptions. A cohesive and integrated procurement system with centralized policymaking, liberal delegation of procurement authority to agencies with special expertise, and implementation by those agencies promotes competition, efficiency, economy, and quality. If this option is adopted, the authority to conduct exempted procurements is delegated by the Legislature to the Purchasing Agencies which require these supplies, services or construction.

[END OF OPTIONAL PART]

Part D- [State] Procurement Regulations

§2-401 [State] Procurement Regulations.

(1) Regulations.

Regulations shall be promulgated in accordance with the applicable provisions of the [Administrative Procedure Act].

(2) [Policy Office] [Chief Procurement Officer] Shall Not Delegate Power to Promulgate Regulations.

The [Policy Office] [Chief Procurement Officer] shall not delegate its power to promulgate regulations.

(3) Regulations Shall Not Change Existing Contract Rights.

No regulation shall change any commitment, right, or obligation of the [State] or of a contractor under a contract in existence on the effective date of such regulation.

Part E-Coordination, Training, and Education

§2-501 Collection of Data Concerning Public Procurement.

The Chief Procurement Officer shall cooperate with the [State Budget Office] and the [State Auditor] in the preparation of statistical data concerning the procurement, usage, and disposition of all supplies, services, and construction, and employ such trained personnel as may be necessary to carry out this function. All Using Agencies shall furnish such reports as the Chief Procurement Officer may require concerning usage, needs, and stocks on hand, and the Chief Procurement Officer shall have authority to prescribe forms to be used by the Using Agencies in requisitioning, ordering, and reporting of supplies, services, and construction.

COMMENTARY:

The [Policy Office and the] Chief Procurement Officer should endeavor to perform their duties in a manner which will ensure that the supplies, services, or construction procured meet the requirements of the Using Agencies. To achieve this goal, [the Policy Office,] the Chief Procurement Officer, and the Using Agencies should be free to make recommendations to each other. A close and cooperative relationship should be maintained.

§2-502 Procurement Advisory Council; Other Advisory Groups.

(1) Procurement Advisory Council.

The [Policy Office] [Chief Procurement Officer] may establish a Procurement Advisory Council and allocate therefor such funds as may be available and the [Policy Office] [Chief Procurement Officer] shall deem appropriate. If created, such Council, upon adequate public notice, shall meet at least once a year for the discussion of problems and recommendations for improvement of the procurement process. When requested by the [Policy Office] [Chief Procurement Officer], the Procurement Advisory Council may conduct studies, research, analyses, and make reports and recommendations with respect to subjects or matters within the

jurisdiction of the [Policy Office] [Chief Procurement Officer]. The Procurement Advisory Council may consist of qualified representatives of State and local government and such other persons as the [Policy Office] [Chief Procurement Officer] may deem desirable.

(2) *Other Advisory Groups.*

The Chief Procurement Officer may appoint Advisory Groups to assist with respect to specifications or procurement in specific areas, and with respect to any other matters within the authority of the Chief Procurement Officer.

(3) *Reimbursement of Expenses.*

Members of the Procurement Advisory Council and other Advisory Groups [shall] [may] be reimbursed for expenses incurred in the performance of their duties, subject to such expenditure limitations as may be prescribed by the [Policy Office] [Chief Procurement Officer] and applicable law.

§2-503 Procurement Institute.

(1) *Creation.*

The [Policy Office] [Chief Procurement Officer] may establish and maintain a Procurement Institute, either alone or in cooperation with other States, the Federal Government, municipalities or other units of local government, or other persons.

(2) *Functions.*

The Procurement Institute may:

- (a) conduct or participate in procurement education and training programs for [State] employees and others, including persons not employed by the [State];
- (b) conduct research into existing and new methods of procurement; and
- (c) establish and maintain a [State] Procurement Library.

(3) *Funding.*

The [Policy Office] [Chief Procurement Officer] may allocate funds for the Procurement Institute as the [Policy Office] [Chief Procurement Officer] deems appropriate.

COMMENTARY:

- (1) The 2000 Code revision process has shown that many of the obstacles procuring agencies and officials encounter are those that have been written into the Code by enacting jurisdictions. The inherent flexibility of much of the language of the Code will be increasingly important as electronic means of communication becomes more prevalent in the coming years. Along with the Code's flexibility is the continuous need for training and education in how to use this flexibility in the pursuit of the [State's] long term procurement needs. The Procurement Institute(s) envisioned in the Code are intended to help enacting jurisdictions use this flexibility, without the need for restrictive additional language that ultimately interferes with cooperative purchasing, electronic purchasing, and broad competition.
- (2) Procurement is a complex process which experience has shown can only be adequately learned over a period of time. Thus training in procurement is vital for new [State] employees without prior experience in the field. It will accelerate the learning process and will tend to make [State] procurement personnel knowledgeable and effective in the minimum time.
- (3) In addition, training courses should also be reasonably available to vendor personnel, university professors, students, and others. Experience has shown that when a vendor or other person affected by the system makes an unnecessary mistake through lack of knowledge of the ground rules of procurement, it causes friction and expense to the State. Some States already have extensive and sophisticated procurement education and training systems through public agencies, public or private university systems, or private, nationally recognized organizations such as the National Association of State Procurement Officials or the National Institute of Governmental Purchasing. Many of these programs have been very successful. Where such training systems exist, it is recommended that they be used to the fullest extent possible.

Part F - Duties of the [Attorney General]

§2-601 Duties of the [Attorney General].

The Attorney General, or such officer as the Attorney General may designate, shall serve as legal counsel and provide necessary legal services to [the Policy Office and] the Chief Procurement Officer.

COMMENTARY:

The Attorney General should serve as the legal counsel to advise and assist the [Policy Office and the] Chief Procurement Officer on legal matters. In most cases, the Attorney General will provide such legal counsel, but if this is not feasible, a high ranking member of the Attorney General's staff should be designated to perform this important function. Such legal counsel should appoint such assistants as may be deemed necessary to act as advisors to personnel in the Chief Procurement Officer's organization and in the Purchasing Agencies. In addition, the legal counsel or assistant should provide prompt legal advice to their clients as each occasion demands, so that the procurement process, where speed is so often necessary, can move ahead promptly.

DEFINITIONAL CROSS-REFERENCES:

"Chief Procurement Officer"	Section	1-301(3)
"Construction"	Section	1-301(4)
"Contract"	Section	1-301(5)
"Contractor"	Section	1-301(7)
"Designee"	Section	1-301(9)
"Employee"	Section	1-301(10)
"Governmental Body"	Section	1-301(11)
"Infrastructure Facility"	Section	5-101(8)
"May"	Section	1-301(14)
"Person"	Section	1-301(15)
"Procurement"	Section	1 -301(16)
"Public Notice"	Section	1-301((18)
"Regulation"	Section	1-301(20)
"Services"	Section	1-301(19)
"Shall"	Section	1-301(22)
"Specification"	Section	4-101(1)
"Supplies"	Section	1-301(24)
"Surplus Supplies"	Section	8-101(5)
"Using Agency"	Section	1-301(25)

ARTICLE 3-SOURCE SELECTION AND CONTRACT FORMATION

Part A-Definitions

§3-101 Definitions of Terms Used in this Article.

- (1) *Cost-Reimbursement Contract* means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this Code, and a fee, if any.
- (2) *Established Catalogue Price* means the price included in a catalogue, price list, schedule, or other form that:
 - (a) is regularly maintained by a manufacturer or contractor;
 - (b) is either published or otherwise available for inspection by customers, and
 - (c) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved,
- (3) *Invitation for Bids* means all documents, whether attached or incorporated by reference, utilized for soliciting bids.
- (4) *Purchase Description* means the words used in a solicitation to describe the supplies, services, or construction to be purchased, and includes specifications attached to, or made a part of the solicitation.
- (5) *Request for Proposals* means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.
- (6) *Responsible Bidder or Offeror* means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.
- (7) *Responsive Bidder* means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.

COMMENTARY:

This Section only defines terms with special meanings that are unique to this Article. Other terms having special meanings that are used both in this Article and in other Articles of this Code are defined in Section 1-301 (Definitions).

DEFINITIONAL CROSS-REFERENCES:

"Change Order"	Section 1-301(2)
"Chief Procurement Officer"	Section 1-301(3)
"Construction"	Section 1-301(4)
"Contract"	Section 1-301(5)
"Contract Modification"	Section 1-301(6)
"Contractor"	Section 1-301(7)
"Data"	Section 1-301(8)
"Designee"	Section 1-301(9)
"Electronic"	Section 1-301(10)
"May"	Section 1-301(14)
"Person"	Section 1-301(15)

"Procurement"	Section 1-301(16)
"Procurement Officer"	Section 1-301(17)
"Public Notice"	Section 1-301(18)
"Purchasing Agency"	Section 1-301(19)
"Regulation"	Section 1-301(20)
"Services"	Section 1-301(21)
"Shall"	Section 1-301(22)
"Signature"	Section 1-301(23)
"Specification"	Section 4-101
"Supplies"	Section 1-301(24)
"Written" or "In Writing"	Section 1-301(26)

Part B-Methods of Source Selection

§3-201 Methods of Source Selection.

Unless otherwise authorized by law, all [State] contracts shall be awarded by one of the following methods:

- (a) Section 3-202 (Competitive Sealed Bidding);
- (b) Section 3-203 (Competitive Sealed Proposals);
- (c) Section 3-204 (Small Purchases);
- (d) Section 3-205 (Sole Source Procurement);
- (e) Section 3-206 (Emergency Procurements);
- (f) Section 3-207 (Special Procurements);
- (g) Section 5-205 (Architectural and Engineering Services).

COMMENTARY:

- (1) With competitive sealed bidding as a starting point (Section 3-202), procurement officials are able to choose an appropriate source selection method to meet the circumstances of each procurement. Procurement officials should be able to freely select an appropriate source selection method, based on that official's discretion. Procurement officials should recognize the flexibility that the Code offers them when using the competitive sealed bidding method, such as product acceptability and multi-step processes.
- (2) The purpose of this Part is to provide procurement officials with adequate authority to conduct procurement transactions by fair and open competition under varying market conditions in order to satisfy public needs for supplies, services, and construction at the most economical prices.
- (3) Fair and open competition is a basic tenet of public procurement. Such competition reduces the opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically. Since the marketplace is different for various supplies, services, and construction, this Code authorizes a variety of source selection techniques designed to provide the best competition for all types of procurements. It also permits less formal competitive procedures where the amount of the contract does not warrant the expense and time otherwise involved. Competitive sealed bidding (Section 3-202), competitive sealed proposals (Section 3-203), simplified, small purchase procedures (Section 3-204), and special procurement procedures (Section 3-207), therefore, are recognized as valid competitive procurement methods when used in accordance with the criteria and conditions set forth in this Article.
- (4) Subsection (d) lists sole source procurements (Section 3-205) as an exception to other methods only when it is determined in writing that there is only one source for the required supply, service, or construction item.
- (5) The statutory authorization in Section 3-201 to use competitive sealed bidding and competitive sealed proposals applies to four new project delivery methods identified in Article 5 of the 2000 Code: design-build, design-build-operate-maintain, design-build-finance-operate-maintain, and operations and maintenance. These four new delivery methods, when added to the design-bid-build project delivery already authorized in the 1979 version of the Code, provide procurement officials with increased flexibility in the procurement of the design, construction, operation, maintenance, and finance of public infrastructure facilities. Article 5 continues to rely on the source selection methods of Article 3, while providing maximum flexibility to procurement officials to separate or integrate the design, construction, operation, maintenance, and finance functions.

§3-202 Competitive Sealed Bidding.

- (1) *Conditions for Use.* Contracts shall be awarded by competitive sealed bidding except as otherwise provided in Section 3-201 (Methods of Source Selection).

COMMENTARY:

Competitive sealed bidding does not include negotiations with bidders after the receipt and opening of bids. Award is to be made based strictly on the criteria set forth in the Invitation for Bids.

- (2) *Invitation for Bids.* An Invitation for Bids shall be issued and shall include a purchase description, and all contractual terms and conditions applicable to the procurement.
- (3) *Public Notice.* Adequate public notice of the Invitation for Bids shall be given a reasonable time prior to the date set forth therein for the opening of bids, in accordance with regulations.

COMMENTARY:

Public notice required by this subsection should be given sufficiently in advance of bid opening to permit potential bidders to prepare and submit their bids in a timely manner. Because the adequacy of notice will, as a practical matter, vary from locality to locality and procurement to procurement, no attempt is made in Subsection (3) to define statutorily either a prescribed method of notice or the duration of its publication. However, the regulations should provide criteria and general guidelines for the method and duration of public notice.

- (4) *Bid Opening.* Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the Invitation for Bids. The amount of each bid, and such other relevant information as may be specified by regulation, together with the name of each bidder shall be recorded; the record and each bid shall be open to public inspection.
- (5) *Bid Acceptance and Bid Evaluation.* Bids shall be unconditionally accepted without alteration or correction, except as authorized in this Code. Bids shall be evaluated based on the requirements set forth in the Invitation for Bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The Invitation for Bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the Invitation for Bids.

COMMENTARY:

(1) The only provisions of this Code that allow alteration or correction of bids are found in Subsection (6) of this Section and Section 5-301(3) (Bid Security, Rejection of Bids for Noncompliance with Bid Security Requirements).

(2) This subsection makes clear that judgmental evaluations of products, particularly where bid samples or product descriptions are submitted, may properly be used in determining whether a product proffered by a bidder meets the acceptability standards of the specification requirements for the procurement. Such judgmental evaluations as appearance, workmanship, finish, taste, and feel all may be taken into consideration under this Subsection. Additionally, the ability to make such determinations, and to reject as nonresponsive any bid which does not meet the purchase description is inherent in the definition of responsive bidder in Section 3-101(7) (Definitions, Responsive Bidder).

(3) The bid evaluation may take into account not only acquisition costs of supplies, but the cost if their ownership which relates to the quality of the product, including life cycle factors such as maintainability and reliability. Any such criteria must be set forth in the Invitation for Bids to enable bidders to calculate how such criteria will affect their bid price.

(4) This Subsection does not permit a contract to be awarded to a bidder submitting a higher quality item than the minimum required by the purchase description unless that bidder also has the bid price evaluated lowest in accordance with the objective criteria set forth in the Invitation for Bids. Furthermore, this procedure does not permit discussions or negotiations with bidders after receipt and opening of bids.

- (6) *Correction or Withdrawal of Bids; Cancellation of Awards.* Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes, shall be permitted in accordance with regulations. After bid opening, no changes in

bid prices or other provisions of bids prejudicial to the interest of the [State] or fair competition shall be permitted. Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the Chief Procurement Officer or head of a Purchasing Agency.

COMMENTARY:

- (1) Correction or withdrawal of bids before or after contract award requires careful consideration to maintain the integrity of the competitive bidding system, to assure fairness, and to avoid delays or poor contract performance. While bidders should be expected to be bound by their bids, circumstances frequently arise where correction or withdrawal of bids is proper and should be permitted.
- (2) To maintain the integrity of the competitive sealed bidding system, a bidder should not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid unless the mistake is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition.
- (3) An otherwise low bidder should be permitted to correct a material mistake of fact in its bid, including price, when the intended bid is obvious from the bid document or is otherwise supported by proof that has evidentiary value. A low bidder should not be permitted to correct a bid for mistakes or errors in judgment.
- (4) In lieu of bid correction, the [State] should permit a low bidder alleging a material mistake of fact to withdraw its bid when there is reasonable proof that a mistake was made and the intended bid cannot be ascertained with reasonable certainty.
- (5) After bid opening an otherwise low bidder should not be permitted to delete exceptions to the bid conditions or specifications which affect price or substantive obligations; however, such bidder should be permitted the opportunity to furnish other information called for by the invitation for Bids and not supplied due to oversight, so long as it does not affect responsiveness.
- (6) A suspected bid mistake can give rise to a duty on the part of the [State] to request confirmation of a bid, and failure to do so can result in a nonbinding award, where there is an appearance of mistake. Therefore, the bidder should be asked to reconfirm the bid before award. In such instances, a bidder should be permitted to correct the bid or to withdraw it when the bidder acknowledges that a mistake was made.
- (7) Correction of bid mistakes after award should be subject to the same proof as corrections before award with a further requirement that no correction be permitted that would cause the contract price to exceed the next low bid.
- (8) Nothing in this Section is intended to prohibit the [State] from accepting a voluntary reduction in price from a low bidder after bid opening; provided that such reduction is not conditioned on, or results in, the modification or deletion of any conditions contained in the Invitation for Bids.

- (7) *Award.* The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids. In the event all bids for a construction project exceed available funds as certified by the appropriate fiscal officer, and the low responsive and responsible bid does not exceed such funds by more than [five] percent, the Chief Procurement Officer, or the head of a Purchasing Agency, is authorized in situations where time or economic considerations preclude resolicitation of work of a reduced scope to negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsive and responsible bidder, in order to bring the bid within the amount of available funds.

COMMENTARY:

- (1) The successful bidder must be responsive as defined in Section 3-101(7) and responsible as defined in Section 3-101(6), and the bid must be the lowest bid determined under criteria set forth in the Invitation for Bids.
- (2) This subsection also provides authority to negotiate changes in construction project bid requirements with a low bidder in order to arrive at a price not in excess of available funds. This authority would be limited to situations where the excess is less than a stated percentage over the available funds. It should be noted that even where the bids exceed the percentage limitation on the discretionary authority to negotiate with the low bidder, if circumstances warrant an emergency determination, the procurement can proceed under Section 3-206 (Emergency Procurements).
- (3) When all bids are determined to be unreasonable or the lowest bid on a construction project exceeds the amount specified in this subsection, and the public need does not permit the time required to resolicit bids, then a contract may be awarded pursuant to the emergency authority in Section 3-206 (Emergency Procurements) in accordance with regulations.
- (4) Note that the new definition of "written or in writing" in Section 1-301(26) permits awards to be issued electronically.

- (8) *Multi-Step Sealed Bidding.* When it is considered impractical to initially prepare a purchase description to support an award based on price, an Invitation for

Bids may be issued requesting the submission of unpriced offers to be followed by an Invitation for Bids limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

COMMENTARY:

To provide additional flexibility in meeting the designated public need, multi-step competitive sealed bidding is authorized.

§3-203 Competitive Sealed Proposals.**(1) Conditions for Use.**

(a) A contract may be entered into by competitive sealed proposals when the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer above the level of the Procurement Officer determines in writing, pursuant to regulations, that the use of competitive sealed bidding is either not practicable or not advantageous to the [State].

(b) Regulations may provide that it is either not practicable or not advantageous to the [State] to procure specified types of supplies, services, or construction by competitive sealed bidding.

(c) Contracts for the design-build, design-build-operate-maintain, or design-build-finance-operate-maintain project delivery methods specified in Article 5 shall be entered into by competitive sealed proposals, except as otherwise provided in subsections (c), (d), (e), and (f) of Section 3-201 (Methods of Source Selection).

COMMENTARY:

(1) The competitive sealed proposal method (similar to competitive negotiation) is available for use when competitive sealed bidding is either not practicable or not advantageous. The competitive sealed proposal method is mandated for the project delivery methods described in Article 5: design-build, design-build-operate-maintain, and design-build-finance-operate-maintain.

(2) The competitive sealed bidding and competitive sealed proposal methods assure price and product competition. The use of functional or performance specifications is allowed under both methods to facilitate consideration of alternative means of meeting [State] needs, with evaluation, where appropriate, on the basis of total or life cycle costs. The criteria to be used in the evaluation process under either method must be fully disclosed in the solicitation. Only criteria disclosed in the solicitation may be used to evaluate the items bid or proposed.

(3) These two methods of source selection differ in the following ways:

(a) Under competitive sealed bidding, judgmental factors may be used only to determine if the supply, service, or construction item bid meets the purchase description. Under competitive sealed proposals, judgmental factors may be used to determine not only if the items being offered meet the purchase description but may also be used to evaluate the relative merits of competing proposals. The effect of this different use of judgmental evaluation factors is that under competitive sealed bidding, once the judgmental evaluation is completed, award is made on a purely objective basis to the lowest responsive and responsible bidder. Under competitive sealed proposals, the quality of competing products or services may be compared and trade-offs made between price and quality of the products or services offered (all as set forth in the solicitation). Award under competitive sealed proposals is then made to the responsible offeror whose proposal is most advantageous to the [State].

(b) Competitive sealed bidding and competitive sealed proposals also differ in that, under competitive sealed bidding, no change in bids is allowed once they have been opened, except for correction of errors in limited circumstances. The competitive sealed proposal method, on the other hand, permits discussions after proposals have been opened to allow clarification and changes in proposals provided that adequate precautions are taken to treat each offeror fairly and to ensure that information gleaned from competing proposals is not disclosed to other offerors.

(4) The words "practicable" and "advantageous" are to be given ordinary dictionary meanings. In general, "practicable" denotes a situation which justifies a determination that a given factual result can occur. A typical determination would be whether there is sufficient time or information to prepare a specification suitable for competitive sealed bidding. "Advantageous" connotes a judgmental assessment of what is in the [State's] best interest. Illustrations include determining:

- (a) whether to utilize a fixed-price or cost-type contract under the circumstances;
- (b) whether quality, availability, or capability is overriding in relation to price in procurements for research and development, technical supplies, or services (for example, developing a traffic management system);
- (c) whether the initial installation needs to be evaluated together with subsequent maintenance and service capabilities and what priority should be given these requirements in the best interests of the [State]; or
- (d) whether the marketplace will respond better to a solicitation permitting not only a range of alternative proposals but evaluation and discussion of them before making the award (for example, computer software programs).

What is practicable (that is possible) may not necessarily be beneficial to the [State]. Consequently, both terms are used in this Section to avoid a possibly restrictive interpretation of the authority to use competitive sealed proposals. If local conditions require an enacting jurisdiction to reduce the proposed flexibility in choosing between competitive sealed bidding and competitive sealed proposals, the statutory determination under Subsection (1)(b) to use competitive sealed proposals should be confined to a determination that use of competitive sealed bidding is "not practicable".

(5) Whenever it is determined that it is practicable but not advantageous to use competitive sealed bidding, the basis for the determination should be specified with particularity.

- (2) *Request for Proposals.* Proposals shall be solicited through a Request for Proposals.
- (3) *Public Notice.* Adequate public notice of the Request for Proposals shall be given in the same manner as provided in Section 3-202(3) (Competitive Sealed Bidding, Public Notice).
- (4) *Receipt of Proposals.* Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A Register of Proposals shall be prepared in accordance with regulations, and shall be open for public inspection after contract award.
- (5) *Evaluation Factors.* The Request for Proposals shall state the relative importance of price and other factors and subfactors, if any.

COMMENTARY:

Subsection (5) requires that the Request for Proposals ("RFP") set forth the relative importance of the factors and any subfactors, in addition to price, that will be considered in awarding the contract. A statement in the RFP of the specific weighting to be used by the jurisdiction for each factor and subfactor, while not required, is recommended so that all offerors will have sufficient guidance to prepare their proposals. This subsection serves two purposes. First, a fair competition necessitates an understanding on the part of all competitors of the basis upon which award will be made. Second, a statement of the basis for award is also essential to assure that the proposals will be as responsive as possible so that the jurisdiction can obtain the optimum benefits of the competitive solicitation. The requirement for disclosure of the relative importance of all evaluation factors and subfactors applies to the areas or items that will be separately evaluated and scored, e.g., the items listed on evaluation score sheets. The requirement does not extend to advance disclosure of the separate items or emphasis that are considered in the mental process of the evaluators in formulating their scores for the factors and subfactors that are described in the solicitation.

- (6) *Discussion with Responsible Offerors and Revisions to Proposals.* As provided in the Request for Proposals, and under regulations, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

COMMENTARY:

(1) Subsection (6) provides the procurement official an opportunity to make certain that offerors fully understand the solicitation requirements and provides offerors an opportunity to clarify proposals where necessary so as to assure responsiveness to the solicitation. Price discussions can best be conducted when there is a mutual understanding of the contractual requirements. Clarifications are intended to promote exchanges between the [State] and an offeror that may occur when an award is contemplated without discussions, for example, to resolve minor or clerical errors or ambiguities in proposals.

(2) When discussions or negotiations are contemplated after the receipt of proposals which are expected to lead to the revision of proposals or to best and final offers, fair and equitable treatment of competitors dictates that negotiations be conducted in accordance with ethical business standards. Auction techniques shall be prohibited in discussions with offerors under the competitive sealed proposal method. There must be a cut-off for the submission of revised proposals and final offers. Both Subsection (4) and Subsection (6) are intended to provide that prices; technical solutions; unique technologies; innovative use of commercial items, design, construction, or operating techniques; or other aspects of proposals submitted by one offeror must not be

disclosed to competing offerors. Safeguards against abuse in the conduct of negotiations must be strictly observed to maintain the essential integrity of the process. Procedures should be specified in regulations in order to achieve these objectives.

- (7) *Award.* Award shall be made to the responsible offeror whose proposal conforms to the solicitation and is determined in writing to be the most advantageous to the [State] taking into consideration price and the evaluation factors set forth in the Request for Proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made. Written notice of the award of a contract to the successful offeror shall be promptly given to all offerors.

COMMENTARY:

The file should show with particularity how the pertinent factors and criteria were applied in determining that the successful proposal is most advantageous to the [State] to assure offerors that their proposals were evaluated fairly and to minimize protests or litigation.

- (8) *Debriefings.* The Procurement Officer is authorized to provide debriefings that furnish the basis for the source selection decision and contract award.

COMMENTARY:

Debriefings may be given orally, in writing, or by any other method acceptable to the Procurement Official. A post-award debriefing may include _ (a) the [State's] evaluation of significant weaknesses or deficiencies in the proposal, if applicable; (b) the overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror; (c) the overall ranking of all proposals, when any such ranking was developed during the source selection; (d) a summary of the rationale for award; (e) reasonable responses to relevant questions about whether source selection procedures contained in the Request For Proposal and applicable law were followed. Post-award debriefings should not include point-by-point comparisons of the debriefed proposal with those of other offerors. Any debriefing should not reveal any information prohibited from disclosure by law, or exempt from release under the [applicable public records laws], including trade secrets, or privileged or confidential commercial or manufacturing information. A summary of any debriefing should be included in the contract file.

§3-204 Small Purchases.

Any procurement not exceeding the amount established by regulation may be made in accordance with small purchase procedures, provided, however, that procurement requirements shall not be artificially divided so as to constitute a small purchase under this Section.

COMMENTARY:

This Section recognizes that certain public purchases do not justify the administrative time and expense necessary for the conduct of competitive sealed bidding. Streamlined procedures, to be set forth in regulations, will make small purchases administratively simpler to complete and yet ensure competition. The appropriate dollar limitations for the use of these procedures are left to regulation within each enacting jurisdiction. Care must be taken to ensure that purchase requirements are not fragmented in order to fall within the authority contained in this Section, thus circumventing the source selection procedures required by either Section 3-202 (Competitive Sealed Bidding), or Section 3-203 (Competitive Sealed Proposals).

§3-205 Sole Source Procurement.

A contract may be awarded for a supply, service, or construction item without competition when, under regulations, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer above the level of the Procurement Officer determines in writing that there is only one source for the required supply, service, or construction item.

COMMENTARY:

(1) This method of procurement involves no competition and should be utilized only when justified and necessary to serve [State] needs. This Code contemplates that the [Policy Office] [Chief Procurement Officer] will promulgate regulations which establish standards applicable to procurement needs that may warrant award on a sole source basis.

(2) The power to authorize a sole source award is limited to the Chief Procurement Officer and the head of an agency with purchasing authority, or their designees above the level of Procurement Officer. The purpose in specifying these officials is to

reflect an intent that such determinations will be made at a high level. The permission for these officials to authorize a designee to act for them should be subject to regulations.

§3-206 Emergency Procurements.

Notwithstanding any other provision of this Code, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer may make or authorize others to make emergency procurements when there exists a threat to public health, welfare, or safety under emergency conditions as defined in regulations; provided that such emergency procurements shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.

COMMENTARY:

- (1) This Section authorizes the procurement of supplies, services, or construction where the urgency of the need does not permit the delay involved in utilizing more formal competitive methods. This Code contemplates that the [Policy Office] [Chief Procurement Officer] will promulgate regulations establishing standards for making emergency procurements and controlling delegations of authority by the Chief Procurement Officer or the head of a Purchasing Agency. Such regulations may limit the authority of such officials to delegate the authority to make procurements above designated dollar amounts.
- (2) While in a particular emergency an award may be made without any competition, the intent of this Code is to require as much competition as practicable in a given situation. When the amount of the emergency procurement is within that adopted for Section 3-204 (Small Purchases), the competitive procedures prescribed under that Section should be used when feasible.
- (3) Use of this Section may be justified because all bids submitted under the competitive sealed bid method are unreasonable, and there is no time to re-solicit bids without endangering the public health, welfare, or safety. As with other emergency conditions, regulations will further define these circumstances, and any procurements conducted pursuant to this authority must be done so as to treat all bidders fairly and to promote such competition as is practicable under the circumstances.

§3-207 Special Procurements.

Notwithstanding any other provision of this Code, the Chief Procurement Officer or the head of a Purchasing Agency may with prior public notice initiate a procurement above the small purchase amount specified in Section 3-204 where the officer determines that an unusual or unique situation exists that makes the application of all requirements of competitive sealed bidding or competitive sealed proposals contrary to the public interest. Any special procurement under this Section shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the procurement and for the selection of the particular contractor shall be included by the Chief Procurement Officer or the head of a Purchasing Agency in the contract file, and a report shall be made publicly available at least annually describing all such determinations made subsequent to the prior report.

COMMENTARY:

- (1) This new Section 2-307 authorizes special procurements in very limited circumstances, where deviations from the strict requirements of the Code are necessary to protect the interest of the [State]. It is based on the versions of the Code adopted by the States of Alaska and Arizona. See Alaska Statutes Section 36.30.308 (authorizing the use of an innovative procurement process under certain conditions to purchase new or unique state requirements, new technologies, or to achieve best value) and Arizona Revised Statutes Section 41-2537 (authorizing, under emergency procurement authority, a waiver for competitive sealed bidding or competitive sealed proposals when doing so is in the State's best interests). To ensure proper safeguards, the 2000 Code contemplates that only the Chief Procurement Officer, or the head of a Purchasing Agency will authorize each special procurement process, and document both the reasons therefore and the selection process followed. The second sentence of the Section confirms that those requirements of the competitive processes that can practicably be applied to such procurement will be applied.
- (2) The 2000 Code revisions delete the original Section 3-207, entitled "Competitive Selection Procedures for Services Specified in Section 2-302." Generally, the original Section specified that certain services - those exempted from direct or delegated procurement authority of the Chief Procurement Office under Section 2-302 - could be purchased through a procurement method in which price was not an evaluation factor. Revisions to Section 2-302 have reduced the need for the original Section 3-207. In addition, the experience of purchasing professionals has been that services may be effectively procured through the Code's other source selection methods. Where enacting jurisdictions have adapted the original Section 3-207 to cover all "professional services," the term has been difficult to define.
- (3) The purchasing method used to buy any service should to be determined based on such factors as the reasons the services are needed and the dollar amount involved. By eliminating the original Section 3-207, the 2000 revision ensures that the Code does not

dictate only one method for purchasing services, and that a full array of factors, not just the type of service alone, is the basis for the source selection method used.

Part C-Cancellation of Invitations for Bids or Requests for Proposals

§3-301 Cancellation of Invitations for Bids or Requests for Proposals.

An Invitation for Bids, a Request for Proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interests of the [State] in accordance with regulations. The reasons therefor shall be made part of the contract file.

COMMENTARY:

It is contemplated that the authority granted by this Section should only be exercised for cogent and compelling reasons as set forth in the regulations.

Part D-Qualifications and Duties

§3-401 Responsibility of Bidders and Offerors.

- (1) *Determination of Nonresponsibility.* A written determination of nonresponsibility of a bidder or offeror shall be made in accordance with regulations. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of non-responsibility with respect to such bidder or offeror.
- (2) *Right of Nondisclosure.* Confidential information furnished by a bidder or offeror pursuant to this Section shall not be disclosed outside of the Office of the Chief Procurement Officer or the Purchasing Agency without prior written consent by the bidder or offeror.

COMMENTARY:

(1) To obtain true economy, the [State] must minimize the possibility of a subsequent default by the contractor, late deliveries, or other unsatisfactory performance which would result in additional administrative costs. Subsection (1) recognizes that it is important that the bidder or offeror will be a responsible contractor--that the contractor has the financial ability, resources, skills, capability, and business integrity necessary to perform the contract.

(2) An inquiry is not required in every case. The extent to which a review or investigation should be conducted will depend on the value and size of the procurement, and the bidder's or offeror's past record of contract performance in the public and private sectors. Since the information solicited from the bidder or offeror for such evaluation may be of a privileged or a proprietary nature, Subsection (2) prohibits the disclosure of such information without the consent of the bidder or offeror.

§3-402 Prequalification of Suppliers.

Prospective suppliers may be prequalified for particular types of supplies, services, and construction. The method of submitting prequalification information and the information required in order to be prequalified shall be determined by the [Policy Office] [Chief Procurement Officer].

COMMENTARY:

(1) Prequalification is not a conclusive determination of responsibility, and a prequalified bidder or offeror may be rejected as nonresponsible on the basis of subsequently discovered information. Similarly, a prior failure to prequalify will not bar a subsequent determination that a bidder or offeror is responsible with respect to any given procurement.

(2) Prequalification is only of limited utility if a procurement cannot be limited to prequalified suppliers. Regulations should establish that unless an emergency exists or the contract is for a small purchase, a competition may not be limited to pre-qualified offerors unless public notice of the procurement was given in sufficient time for any interested firms to prepare necessary submissions and become prequalified.

§3-403 Substantiation of Offered Prices.

The Procurement Officer may request factual information reasonably available to the bidder or offeror to substantiate that the price or cost offered, or some portion of it, is reasonable, if:

- (1) the price is not:
 - (a) based on adequate price competition;
 - (b) based on established catalogue or market prices; or
 - (c) set by law or regulation; and
- (2) the price or cost exceeds an amount established in the regulations.

COMMENTARY:

The 2000 revisions have changed the 1979 Code's requirement to submit certified cost or pricing data (which was modeled on the Truth in Negotiations Act, 10 U.S.C. 2306a) to reflect a less burdensome standard appropriate to the commercial supplies and services that state and local governments buy. The threshold for submission of such data is left to regulations but should be substantial. The data must also be limited to that normally kept by the contractor and not require extensive sweeps to gather data not reasonably available.

Part E-Types of Contracts

§3-501 Types of Contracts.

Subject to the limitations of this Section, any type of contract which will promote the best interests of the [State] may be used; provided that the use of a cost-plus-a-percentage-of-cost contract is prohibited. A cost-reimbursement contract may be used only when a determination is made in writing that such contract is likely to be less costly to the [State] than any other type or that it is impracticable to obtain the supplies, services, or construction required except under such a contract.

COMMENTARY:

- (1) The intent of this Section is to authorize any type of contract which best suits the interest of the [State] except that a cost-plus-a-percentage-of-cost contract is prohibited. Examples of contract types permitted are firm fixed price, fixed price with economic price adjustments, fixed price incentive, cost reimbursement and time and materials contracts. Other types of cost-reimbursement contracts may be used when uncertainties involved in the work to be performed are of such magnitude that the cost of performance is too difficult to estimate with reasonable certainty, and use of a fixed-price contract could seriously affect a contractor's financial stability or result in payments by the (State] for contingencies that never occur. Use of cost-type contracts are also authorized when it is impracticable to contract on any other basis.
- (2) Article 7 (Cost Principles) requires that only those costs recognized as allowable under the contract will be reimbursed.
- (3) It is contemplated that the regulations will contain guidelines or requirements for the review and/or approval of subcontracts awarded by cost-reimbursement contractors as deemed appropriate to protect the financial interests of the [State].

§3-502 Approval of Accounting System.

Regulations shall be issued requiring that contractors submit appropriate documentation prior to the award of contracts in which the [State] agrees to reimburse costs, confirming that:

- (a) the proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by the specific contract type contemplated; and
- (b) the proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles.

COMMENTARY:

This Section does not require any particular accounting method and leaves to the [State's] discretion the determination of the adequacy of any given accounting system. The 2000 revisions clarified that only when costs are to be reimbursed is there any need to review the contractor's cost accounting and allocation system. This review should be consistent with the type of costs to be reimbursed. For instance, if only direct material costs are to be reimbursed, there is much less chance that system inadequacies will lead to problems, than if reimbursement of actual overhead and general and administrative expenses are required by the contract.

§3-503 Multi-Year Contracts.

- (1) *Specified Period.* Unless otherwise provided by law, a contract for supplies or services may be entered into for any period of time deemed to be in the best interests of the [State] provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.
- (2) *Use.* A multi-year contract is authorized where:
 - (a) estimated requirements cover the period of the contract and are reasonably firm and continuing; and
 - (b) such a contract will serve the best interests of the [State] by encouraging effective competition or otherwise promoting economies in [State] procurement.
- (3) *Cancellation Due to Unavailability of Funds in Succeeding Fiscal Periods.* When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled and the contractor shall be reimbursed for the reasonable value of any non-recurring costs incurred but not amortized in the price of the supplies or services delivered under the contract. The cost of cancellation may be paid from any appropriations available for such purposes.

COMMENTARY:

- (1) The 2000 revisions to the Code are intended to clarify that multi-year contracts are a common method of procurement, and that contract durations need not be tied exclusively to fiscal years. The phrase "multi-term" has been changed to "multi-year", which a number of commentators have suggested was confusing. Some jurisdictions may have legislative restrictions upon the use of funds in a calendar year other than that in which the funds are appropriated. This Section permits multi-year procurements in order to enable a [State] to procure larger quantities and obtain the benefits of volume discounts. A multi-year contract should be used only for supplies or services needed on a continuing basis with annual quantity requirements that can be reasonably estimated in advance. Multi-year procurements should attract more competitors to submit bids or offers for the larger contract awards and thereby provide the jurisdiction with the benefits of increased competition.
- (2) Subsection (3) is applicable when funds are not appropriated in a subsequent year of a multi-year contract which is in progress. Where funds are not appropriated or otherwise made available for the next funding period of the contract, there is no alternative but to cancel the contract and to reimburse the contractor for those non-recurring costs that have not been amortized through the selling price of goods already delivered under the contract.
- (3) The phrase "non-recurring costs" in Subsection (3) should be broadly construed.

Part F-Inspection of Plant and Audit of Records**§3-601 Right to Inspect Plant.**

The [State] may, at reasonable times, inspect the part of the plant or place of business of a contractor or any subcontractor which is related to the performance of any contract awarded or to be awarded by the [State].

§3-602 Right to Audit Records

- (1) *Audit of Cost or Pricing Data.* The [State] may, at reasonable times and places, audit the books and records of any person who has submitted data in substantiation of offered prices pursuant to Section 3-403 (Substantiation of Offered Prices) to the extent that such books and records relate to that data. Any person who receives a contract, change order, or contract modification

for which such data is required, shall maintain such books and records that relate to such cost or pricing data for [three] years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing.

- (2) *Contract Audit.* The [State] shall be entitled to audit the books and records of a contractor or any subcontractor under any negotiated contract or subcontract other than a firm fixed-price contract to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of [three] years from the date of final payment under the prime contract and by the subcontractor for a period of [three] years from the date of final payment under the subcontract, unless a shorter period is otherwise authorized in writing.

Part G-Determinations and Reports

§3-701 Finality of Determinations.

The determinations required by Section 3-202(6) (Competitive Sealed Bidding, Correction or Withdrawal of Bids; Cancellation of Awards), Section 3-203(1) (Competitive Sealed Proposals, Conditions for Use), Section 3-203(7) (Competitive Sealed Proposals, Award), Section 3-205 (Sole Source Procurement), Section 3-206 (Emergency Procurements), Section 3-207 (Special Procurements), Section 3-401(1) (Responsibility of Bidders and Offerors, Determination of Non-responsibility), Section 3-403(3) (Substantiation of Offered Prices), Section 3-501 (Types of Contracts), Section 3-502 (Approval of Accounting System), Section 3-503(2) (Multi-Term Contracts, Determination Prior to Use) and Section 5-203 (Choice of Project Delivery Methods) are final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.

§3-702 Reporting of Anticompetitive Practices.

When for any reason collusion or other anticompetitive practices are suspected among any bidders or offerors, a notice of the relevant facts shall be transmitted to the Attorney General.

§3-703 Retention of Procurement Records.

All procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the [Attorney General]. All retained documents shall be made available to the [Attorney General] or a designee upon request and proper receipt therefor.

§3-704 Record of Procurement Actions Taken Under Section 3-205 (Sole Source Procurement), Section 3-206 (Emergency Procurements), and Section 3-207 (Special Procurements).

- (1) *Contents of Record.* The Chief Procurement Officer shall maintain a record listing all contracts made under Section 3-205 (Sole Source Procurement), Section 3-206 (Emergency Procurements), or 3-207 (Special Procurements) for a minimum of [five] years. The record shall contain:
 - (a) each contractor's name;
 - (b) the amount and type of each contract; and

- (c) a listing of the supplies, services, or construction procured under each contract.
- (2) *Submission to [Legislature]*. A copy of the record required by Subsection (1) shall be submitted to the [legislature] on an annual basis. The record shall be available for public inspection.

ARTICLE 4-SPECIFICATIONS

Part A-Definitions

§4-101 Definitions of Terms Used in this Article.

- (1) *Specification* means any description of the physical or functional characteristics, or of the nature of a supply, service, or construction item. It may include a description of any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery.

DEFINITIONAL CROSS-REFERENCES:

"Chief Procurement Officer"	Section 1-301(3)
"Construction"	Section 1-301(4)
"May"	Section 1-301(14)
"Regulation"	Section 1-301(20)
"Services"	Section 1-301(21)
"Shall"	Section 1-301(22)
"Supplies"	Section 1-301(24)
"Using Agency"	Section 1-301(22)
"Written" or "In Writing"	Section 1-301(26)

Part B-Specifications

§4-201 Regulations for Specification Preparation

Regulations shall set standards for the preparation, maintenance, and content of specifications for supplies, services, and construction required by the [State].

§4-202 Duties of the Chief Procurement Officer.

The [Chief Procurement Officer] shall monitor the use of specifications for supplies, services, and construction required by the [State] [Purchasing Agency].

COMMENTARY:

Regulations will set standards as to how specifications and work statements are drafted. The Chief Procurement Officer is charged with ensuring those who prepare the specifications meet those standards.

§4-203 [Reserved]

COMMENTARY:

The 1979 version of the Code contained a provision under this Section authorizing a Purchasing Agency to prepare its own specifications for certain items that were exempted from the authority of the Chief Procurement Officer. Section 4-202 (Duties of the Chief Procurement Officer) has been revised to eliminate the specific requirement that he or she prepare all specifications. With this change, the provisions of Section 4-203 are no longer necessary.

§4-204 Relationship With Using Agencies.

The Chief Procurement Officer shall obtain expert advice and assistance from personnel of Using Agencies in the development of specifications and may delegate in writing to a Using Agency the authority to prepare and utilize its own specifications.

§4-205 Maximum Practicable Competition.

All specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the [State's] needs, and shall not be unduly restrictive.

§4-206 Specifications Prepared by Other Than [State] Personnel.

The requirements of this Article regarding the purposes and nonrestrictiveness of specifications shall apply to all specifications prepared other than by [State] personnel, including, but not limited to, those prepared by architects, engineers, and designers.

ARTICLE 5 - PROCUREMENT OF INFRASTRUCTURE FACILITIES AND SERVICES

Part A-Definitions

§5-101 Definitions

(1) *Architectural and Engineering Services* means:

(a) professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this Subsection;

(b) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and

(c) such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including: studies, investigations, surveying, mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

COMMENTARY:

(1) The revision to the definition of architectural and engineering services adopts the federal statutory definition of such services codified at 40 U.S.C. 541. See also 48 C.F.R. Chapter 1, Section 36.102. This change is intended to promote a unified national definition of architectural and engineering services, to accurately describe the services design professionals typically provide, and to minimize transaction costs imposed on vendors of design services that arise from arcane differences in the definition of such services among state and local jurisdictions. This definition has been routinely applied for many years on federally supported state/local infrastructure projects for water, wastewater, transit, and highway projects.

(2) The 1979 edition of the Code included the following definition of "Architect -Engineer Services and Land Surveying Services":
"Architect-Engineer Services and Land Surveying Services are those professional services within the scope of the practice of architecture, professional engineering, or land surveying, as defined by the laws of this State."

(3) The new definition promotes closer integration of project feasibility and evaluation services with the evaluation of design and project alternatives. Current nationwide efforts to improve overall Infrastructure Asset Management techniques and strategies reflects a growing need for public owners to assess the effects of alternative designs, technologies, projects, schedules, and finance methods on initial and life-cycle quality, cost, and time of delivery of entire collections of infrastructure facilities. Public owners need to structure long term strategies for the design, construction, operation, and maintenance of collections of infrastructure facilities. The American Consulting Engineers' Council's present focus on value based delivery systems, for instance, is one example of how an integrated approach to the procurement of design and related services encourages the design professional's role as a trusted advisor in the simultaneous use of a variety of project delivery and finance methods.

(2) *Design-bid-build* means a project delivery method in which the Purchasing Agency sequentially awards separate contracts, the first for architectural and engineering services to design the project and the second for construction of the project according to the design.

COMMENTARY:

This definition is new to the Code, although design-bid-build is a proven, commonly used public procurement method throughout the United States that was previously authorized under the 1979 Code. Included within the concept of design-bid-build is a widely

used variation known as construction management at risk. The Code permits the [State] to elect to employ construction management at risk or design-bid-build, based upon the authority contained in Section 5-202(2)(b) .

- (3) *Design-build* means a project delivery method in which the Purchasing Agency enters into a single contract for design and construction of an infrastructure facility.

COMMENTARY:

This definition is new to the Code. Design-build is a productive, competitive alternative to design-bid-build and construction management at risk when the government has established the functional requirements (or design criteria) of a project. The Code defines these "functional requirements" or "design criteria" as "design requirements" in Section 5-101 (6).

- (4) *Design-build-finance-operate-maintain* means a project delivery method in which the Purchasing Agency enters into a single contract for design, construction, finance, maintenance, and operation of an infrastructure facility over a contractually defined period. No [State] funds are appropriated to pay for any part of the services provided by the contractor during the contract period.

COMMENTARY:

(1) This definition is new to the Code. Design-build-finance-operate-maintain is a proven delivery method in common use throughout the world and in American antiquity. Design-build finance-operate-maintain integrates long term operation and maintenance, as well as project finance, into a single competition. Design-build finance-operate-maintain depends on the prior establishment of functional requirements of a project.

(2) Design-build-finance-operate-maintain has characteristics distinct from design-build-operate-maintain as defined in Section 5-101(5)). In design-build finance-operate-maintain, no agency funds are appropriated to pay for any part of the services provided by the contractor during the contract period. This distinction is important in the statutory scheme, since the government's competitive sealed proposal process is structured on the premise that offerors will be required to finance the project, with no expectation of state appropriations. This project delivery method should be carefully and wisely used, since design-build finance-operate-maintain makes practical sense only where government has made a preliminary determination that project revenues are sufficient, over the length of the proposed contract, to cover design, construction, finance, and operations.

- (5) *Design-build-operate-maintain* means a project delivery method in which the Purchasing Agency enters into a single contract for design, construction, maintenance, and operation of an infrastructure facility over a contractually defined period. All or a portion of the funds required to pay for the services provided by the contractor during the contract period are either appropriated by the [State] prior to award of the contract or secured by the [State] through fare, toll, or user charges.

COMMENTARY:

This definition is new to the Code. Design-build-operate-maintain integrates long term operation and maintenance into a single competition. Design-build-operate-maintain depends on the prior establishment by the government of the functional requirements of a project. Note the differences in the definition of design-build-operate-maintain from that of design-build finance-operate-maintain. Projects which are partially or completely funded by direct public appropriations or by publicly imposed user charges, fares, or tolls are defined in the Code as design-build-operate-maintain projects.

- (6) *Design requirements* means the written description of the infrastructure facility or service to be procured under this Article, including:

(a) required features, functions, characteristics, qualities, and properties that are required by the [State];

(b) the anticipated schedule, including start, duration, and completion;
and

(c) estimated budgets (as applicable to the specific procurement) for design, construction, operation and maintenance.

The design requirements may, but need not, include drawings and other documents illustrating the scale and relationship of the features, functions, and characteristics of the project.

COMMENTARY:

(1) This definition is new to the Code. The revised code requires that design requirements be set forth in Requests for Proposals that solicit proposals using the design-build, design-build-operate-maintain, and design-build-finance-operate-maintain project delivery methods. See Section 5-201 (1) and 5-202.

(2) The Code flexibly defines design requirements, because the specifics of each project vary. Government prepares a functional description that sets forth only the essential features of each project, including anticipated schedule, and estimated budget for design, construction, operation, and maintenance. The integrated procurement methods – design-build, design-build-operate-maintain, and design-build-finance-operate-maintain permit the government to use the competitive process to test for higher quality, lower price, and quicker delivery. If the design requirements go beyond functional description into particular design, construction, finance, or operational requirements, the scope and the intensity of this competition is compromised, to the detriment of both government and offerors. For example, “design-build” competitions in which major design decisions are already set forth in the design requirements – known in the industry as “detail-build” – are not likely to produce innovation in the integration of design and construction. “Detail-build” procurements split the professional design function between government and the contractor, an allocation that leads to confusion and disputes over liability for design, for construction results, and for performance problems. The Code encourages government: (1) to prepare design requirements for each project before a procurement method is selected; and (2) to procure the design function from a single entity.

- (7) *Independent Peer Reviewer Services* are additional architectural and Engineering services provided to the [State] in design-build-operate-maintain or design-build-finance-operate-maintain procurements. The function of the independent peer reviewer is to confirm that the key elements of the professional engineering and architectural design provided by the contractor are in conformance with the applicable standard of care.

COMMENTARY:

(1) This definition is new to the Code, and is applicable to design-build-operate-maintain and design-build-finance-operate-maintain projects, that is, those procurements in which the design function is integrated with both construction and operations.

(2) The independent peer reviewer function is applied to these types of procurements because these project delivery methods typically include contract periods for operations and maintenance of between 15 and 25 years. In design-build-operate-maintain and design-build-finance-operate-maintain procurements, a high portion of the contract price is devoted to operation, maintenance, and (in the case of design-build-finance-operate-maintain) to financing concerns. The government has heightened, but practical interests: (a) to ensure that initial design is consistent with the applicable standard of care; (b) to preserve the government’s investment in the project during the contract period; and (c) to provide increased flexibility in the event a termination for convenience or for default is in the government’s interest. An independent, contemporaneous, peer review by a highly qualified professional designer will help to ensure that the contractor’s design comports with good engineering and architectural practice at the time the services are rendered.

(3) The Code requires that the independent peer reviewer be identified by each offeror during the competitive process, and the experience and qualifications of each particular proposed reviewer is made an evaluation factor by Section 5-204(3)(b). Each offeror has strong incentive to select a highly qualified reviewer, in whom both the government and the offeror have confidence.

- (8) *Infrastructure Facility* means a building; structure; or networks of buildings, structures, pipes, controls, and equipment that provide transportation, utilities, public education, or public safety services. Included are government office buildings; public schools; courthouses; jails; prisons; water treatment plants, distribution systems, and pumping stations; wastewater treatment plants, collection systems, and pumping stations; solid waste disposal plants, incinerators, landfills, and related facilities; public roads and streets; highways; public parking facilities; public transportation systems, terminals, and rolling stock; rail, air, and water port structures, terminals, and equipment.

COMMENTARY:

This definition is new to the Code. The addition of the term “infrastructure facility” facilitates the Code’s treatment of design, construction, finance, and operations as separate or integrated functions.

- (9) *Operations and Maintenance* means a project delivery method whereby the Purchasing Agency enters into a single contract for the routine operation, routine repair, and routine maintenance of an infrastructure facility.

COMMENTARY:

This definition is new to the Code. Contracts for operations and maintenance services offer governments flexible alternatives to utilize competitive procurement processes to combine initial strategies for delivering an infrastructure facility with long-term strategies to operate and maintain either new or existing facilities. Design-bid-build or design-build can be followed by an operations and maintenance procurement to provide for the overall delivery of an infrastructure facility and service. Many governments will continue to produce new facilities using either the Design-bid-build or design-build project delivery method, followed by long term operations and maintenance directly by public employees. The Code gives procurement officials the flexibility to use competitive sealed bidding to acquire all or a portion of the supplies and services required to maintain and operate infrastructure facilities.

- (10) *Proposal development documents* means drawings and other design related documents that are sufficient to fix and describe the size and character of an infrastructure facility as to architectural, structural, mechanical and electrical systems, materials, and such other elements as may be appropriate to the applicable project delivery method.

COMMENTARY:

This definition is new to the Code. The Code requires that proposal development documents be solicited in Requests for Proposals that use design-build, design-build-operate-maintain, and design-build-finance-operate-maintain project delivery methods. See Section 5-204(2)(b).

DEFINITIONAL CROSS-REFERENCES:

"Change Order"	Section	1-301(2)
"Chief Procurement Officer"	Section	1-301(3)
"Construction"	Section	1-201(4)
"Contract"	Section	1-301(5)
"Contract Modification"	Section	1-301(6)
"Contractor"	Section	1-301(7)
"Cost-Reimbursement Contract"	Section	3-101(1)
"Data"	Section	1-301(8)
"Designee"	Section	1-301(9)
"Invitation for Bids"	Section	3-101(3)
"May"	Section	1-301(14)
"Person"	Section	1-301(15)
"Procurement"	Section	1-301(16)
"Procurement Officer"	Section	1-301(17)
"Public Notice"	Section	1-301(18)
"Purchase Description"	Section	3-101(4)
"Purchasing Agency"	Section	1-301(19)
"Regulation"	Section	1-301(20)
"Request for Proposals"	Section	3-101(5)
"Responsible Bidder"	Section	3-101(6)
"Responsive Bidder"	Section	3-101(7)
"Services"	Section	1-301(21)
"Shall"	Section	1-301(22)
"Specification"	Section	4-101
"Supplies"	Section	1-301(24)
"Written" or "In Writing"	Section	1-301(26)

Part B - Contracting for Infrastructure Facilities and Services

§5-201 Project Delivery Methods Authorized

- (1) The following project delivery methods are authorized for procurements relating to infrastructure facilities and services in this [State]:
- (a) Design-bid-build (including construction management at-risk);

- (b) Operations and maintenance;
 - (c) Design-build;
 - (d) Design-build-operate-maintain;
 - (e) Design-build-finance-operate-maintain.
- (2) Participation in a report or study that is subsequently used in the preparation of design requirements for a project shall not disqualify a firm from participating as a member of a proposing team in a design-build, design-build-operate-maintain, or design-build-finance-operate-maintain procurement unless such participation would provide the firm with a substantial competitive advantage.

COMMENTARY:

(1) The purpose of this Part is to provide procurement officials with adequate authority to conduct procurement transactions by fair and open competition under varying market conditions in order to satisfy public needs for infrastructure-related supplies, services, and construction at the most economical prices. This Article does not compel government procurement officials to use only one of these methods, or to contract for maintenance and operations services which could be done internally. Rather, the article permits any one or more of the common components of an infrastructure facility procurement – design, construction, operations and maintenance, and finance – to be procured competitively by contract, either separately or in combination with one or more other elements.

(2) The Code permits integrated project delivery methods to be used as well, including design-build, design-build-operate-maintain, and design-build-finance-operate-maintain. The integration of design with construction (design-build), or design with construction and operations (design-build-operate-maintain), or design with finance, construction, and operations (design-build-finance-operate-maintain) offers significant quality, cost, and time benefits to government, to taxpayers, and to ratepayers, in appropriate circumstances.

§5-202 Source Selection Methods Assigned to Project Delivery Methods.

(1) Scope

This Section specifies the source selection methods applicable to procurements for the project delivery methods identified in Section 5-201 (Project Delivery Methods Authorized), except as provided in Section 3-204 (Small Purchases), 3-205 (Sole Source Procurement), 3-206 (Emergency Procurements), and 3-207 (Special Procurements).

(2) Design-bid-build

(a) Design: Architectural and Engineering Services.

The qualifications based selection process set forth in Section 5-205 (Design: Architectural and Engineering Services) shall be used to procure architectural and engineering services in design-bid-build procurements.

(b) Construction.

Competitive sealed bidding, as set forth in Section 3-202 (1)(b) (Competitive Sealed Bidding), shall be used to procure construction in design-bid-build procurements, [except where regulations authorize the use of competitive sealed proposals, as set forth in Section 3-203 (Competitive Sealed Proposals), for contracts for construction management at-risk.]

COMMENTARY:

The bracketed language should be adopted by those jurisdictions wishing to include “construction management at risk” as one of the available purchasing options for the construction component of design-bid-build procurement. The intent of the Code is to permit the procurement of a construction manager prior to the completion of design, to perform the construction function.

(3) Operations and Maintenance.

Contracts for operations and maintenance shall be procured as set forth in Section 3-201 (Methods of Source Selection).

COMMENTARY:

Contracts for operations and maintenance services offer governments flexible, competitive procurement processes to combine initial strategies for delivering an infrastructure facility with long-term strategies to operate and maintain either new or existing facilities. Design-bid-build or design-build can be followed by an operations and maintenance procurement to provide for the overall delivery of an infrastructure facility and service.

(4) Design-build.

Contracts for design-build shall be procured by competitive sealed proposals, as set forth in Section 3-203 (Competitive Sealed Proposals), [except that the regulations may describe the circumstances under which particular design-build procurements will not require the submission of proposal development documents as required in Section 5-204(2)(b).]

COMMENTARY:

(1) The provisions of Section 5-204 (Additional Procedures Applicable to Certain Project Delivery Methods) provide additional procedures applicable to design-build procurements under Section 3-203 (Competitive Sealed Proposals.)

(2) The bracketed language provides procurement officials with the authority to exempt, by regulation, one or more design-build procurements from the requirement in Section 3-203(2)(b) that Request For Proposals for design-build services solicit proposal development documents from each offeror. The effect of this language, if used, is to permit the selection of a design-builder based primarily on qualifications. This option has the effect of applying a Qualifications Based Selection system ("QBS") to the design-build process. Without proposal development documents, design is insufficiently developed to include a fixed price as one of the evaluation criteria at the time the design-builder is selected. This approach has been applied successfully on numerous design-build projects, and is ideal where a firm limit on available funds has already been established by the public owner.

(5) Design-build-operate-maintain.

Contracts for design-build-operate-maintain shall be procured by competitive sealed proposals, as set forth in Section 3-203 (Competitive Sealed Proposals).

COMMENTARY:

The provisions of Section 5-204 (Additional Procedures Applicable to Certain Project Delivery Methods) provide additional procedures applicable to design-build-operate-maintain procurements under Section 3-203 (Competitive Sealed Proposals.)

(6) Design-build-finance-operate-maintain.

Contracts for design-build-finance-operate-maintain shall be procured by competitive sealed proposals, as set forth in Section 3-203 (Competitive Sealed Proposals).

COMMENTARY:

The provisions of Section 5-204 (Additional Procedures Applicable to Certain Project Delivery Methods) provide additional procedures applicable to design-build-finance-operate-maintain procurements under Section 3-203 (Competitive Sealed Proposals.)

§5-203 Choice of Project Delivery Methods.

Regulations shall be promulgated describing the project delivery methods listed in Section 5-201 (Project Delivery Methods Authorized). These regulations shall:

- (a) set forth criteria to be used in determining which project delivery method is to be used for a particular project;
- (b) grant to the Chief Procurement Officer, or the head of the Purchasing Agency responsible for carrying out the project, the discretion to select an appropriate project delivery method for a particular project;
- (c) describe the bond, insurance, and other security provisions contained in Part C of this Article that apply to each project;

- (d) describe the appropriate contract clauses and fiscal responsibility requirements contained in Part D of this Article that apply to each project; and
- (e) require the procurement officer to execute and include in the contract file a written statement setting forth the facts which led to the selection of a particular project delivery method for each project.

COMMENTARY:

(1) The 2000 revisions permit procurement officials, in a single decision-making process, to assign different project delivery methods to a number of infrastructure facilities. Numerous state and local governments are looking for ways to better allocate scarce resources across all of their infrastructure holdings. The 2000 revisions encourage procurement officials to make the project delivery decision in the context of an overall capital development program for infrastructure asset management.

(2) In addition to the project delivery methods listed in Section 5-201 and 5-202, other variations on the design-bid-build method might be used for design, construction, operations, maintenance, and, in appropriate circumstances, finance. This Section authorizes the [State] to issue appropriate regulatory guidance for the use of these project delivery methods for infrastructure facilities and services. A contract clause which simply requires separate prime contractors to cooperate and coordinate with each other without a central planning and management coordinator is not considered an acceptable method of project delivery.

(3) The specific terms in a Request for Proposal for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain services will necessarily vary based upon the specific financial, engineering, architectural, and technological issues confronting a particular project. This Section of the Code authorizes the [State] to issue appropriate regulatory guidance for the application of these methods to infrastructure facilities and services.

§5-204 Additional Procedures Applicable to Procurement of Certain Project Delivery Methods

- (1) *Applicability.* In addition to the requirements of Section 3-203 (Competitive Sealed Proposals), the procedures in this Section shall apply to procurements for design-build (Section 5-202(4)), design-build-operate-maintain (Section 5-202(5)), and design-build-finance-operate-maintain (Section 5-202(6)).
- (2) *Content of Request for Proposals.* Each Request for Proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain:
 - (a) shall include design requirements;
 - (b) shall solicit proposal development documents; and
 - (c) may, when the [Purchasing Agency] determines that the cost of preparing proposals is high in view of the size, estimated price, and complexity of the procurement:
 - (i) prequalify offerors by issuing a Request for Qualifications in advance of the Request For Proposals; and
 - (ii) select a short list of responsible offerors prior to discussions and evaluations under subsection 3-203(6), provided that the number of proposals that will be short-listed is stated in the Request for Proposals and prompt public notice is given to all offerors as to which proposals have been short-listed; or
 - (iii) pay stipends to unsuccessful offerors, provided that the amount of such stipends and the terms under which stipends will be paid are stated in the Request for Proposals.

COMMENTARY:

Subsection (2) establishes two requirements when the competitive sealed proposal process is applied to infrastructure projects: (1) that government clearly set forth the functional requirements of each project through design requirements, and (2) that government require qualified offerors to submit proposal development documents for evaluation. The terms "design requirements" and

"proposal development documents" are defined in Section 5-101 (6) and 5-101 (10), respectively. Subsection (2)(c) adds pre-qualification, short-listing, and stipends as options. Procurement mechanisms must be sensitive to the relatively high cost of preparing "priced" offers for design-build, design-build-operate-maintain, and design-build-finance-operate-maintain. The Code allows procurement officials to flexibly approach and resolve this issue, since it is in both parties' interests to keep proposal costs within reasonable limits.

- (3) *Evaluation Factors.* Each Request for Proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain:
 - (a) shall state the relative importance of (1) demonstrated compliance with the design requirements, (2) offeror qualifications, (3) financial capacity, (4) project schedule, (5) price (or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements), and (6) other factors, if any; and
 - (b) shall require each offeror, [when the contract price is estimated to exceed \$10,000,000 or when the contract period of operations and maintenance is ten years or longer] [in circumstances established by regulation], to identify an Independent Peer Reviewer whose competence and qualifications to provide such services shall be an additional evaluation factor in the award of the contract.

COMMENTARY:

Subsection (3) applies to design-build, design-build-operate-maintain, and design-build-finance-operate-maintain procurements only. Complex numerical analysis of numerous factors is likely to diffuse, rather than focus, competition among potential offerors. Competitive proposals can be sought through the simple statement of five or six evaluation factors: e.g. (1) demonstrated compliance with the design requirements, (2) offeror qualifications, (3) financial capacity, (4) project schedule, (5) price (or life-cycle price in appropriate circumstances), and (6) other factors. See, the Commentary to §3-203(5) for a discussion of the underlying requirements for disclosure of factors and subfactors. The qualifications of the Independent Peer Reviewer may be an additional evaluation factor in design-build-operate-maintain and design-build-finance-operate-maintain procurements. The design requirements establish the key performance requirements of the project. The Code requires proposals to be submitted at the end of design development, which provides the [State] with ready comparisons of each proposal as to functional compliance, quality, price, and schedule. Proposals provide independent confirmation of the State's pre-solicitation assessment of price, time, and quality. Subsection (b) requires the use of an Independent Peer Reviewer on design-build-operate-maintain, and design-build-finance-operate-maintain contracts above a threshold dollar value. The Independent Peer Reviewer provides an independent professional peer review of key elements of the design of major public facilities. The Independent Peer Reviewer's function is not to conduct a second design alongside the designers of record. The Independent Peer Reviewer's purpose is to provide the government with independent professional advice and assurance that key design elements of the project are consistent with the functional description in the Request for Proposals and with the common law standard of professional care. The Independent Peer Reviewer's contractual relationship and professional obligation is to the [State]. By requiring that the offeror recommend an appropriate Independent Peer Reviewer (upon which the offeror is evaluated), the professional quality of the Independent Peer Reviewer is assured to be high.

§5-205 Architectural and Engineering Services

(1) Policy.

It is the policy of this [State] to publicly announce all requirements for Architectural and Engineering Services and to negotiate contracts for Architectural and Engineering Services on the basis of demonstrated competence and qualification for the type of services required, and at fair and reasonable prices.

COMMENTARY:

This section must be read in conjunction with Section 5-202 (Source Selection Methods Assigned to Project Delivery Methods).

(2) Architectural and Engineering Selection Committee.

In the procurement of *Architectural and Engineering Services*, the Chief Procurement Officer or the head of a Purchasing Agency shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. [The Chief Procurement Officer or the head of a Purchasing Agency, the Procurement Officer, and [the State Architect]] shall comprise the Architect-Engineer Selection Committee for each Architectural and Engineering Services contract over [\$]. The Selection Committee for *Architectural and Engineering Services* contracts under this amount shall be established in accordance with regulations promulgated by the [Policy Office] [Chief Procurement Officer] [State]. The Selection Committee shall evaluate current statements of qualifications and performance data on file with the [State], together with those that may be submitted by other firms regarding the proposed contract. The Selection Committee shall conduct discussions with no less than three firms regarding the contract and the relative utility of alternative methods of approach for furnishing the required services, and then shall select therefrom, in order of preference, based upon criteria established and published by the Selection Committee, no less than three of the firms deemed to be the most highly qualified to provide the services required.

(3) Negotiation.

The Procurement Officer shall negotiate a contract with the highest qualified firm for Architectural and Engineering Services at compensation which the Procurement Officer determines in writing to be fair and reasonable to the [State]. In making this decision, the Procurement Officer shall take into account the estimated value, the scope, the complexity, and the professional nature of the services to be rendered. Should the Procurement Officer be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price the Procurement Officer determines to be fair and reasonable to the [State], negotiations with that firm shall be formally terminated. The Procurement Officer shall then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the Procurement Officer shall formally terminate negotiations. The Procurement Officer shall then undertake negotiations with the third most qualified firm. Should the Procurement Officer be unable to negotiate a contract at a fair and reasonable price with any of the selected firms, the Procurement Officer shall select additional firms in order of their competence and qualifications, and the Procurement Officer shall continue negotiations in accordance with this Section until an agreement is reached.

COMMENTARY:

- (1) This Section applies to procurement of all services within the scope of architecture and engineering services. The language in this section is unchanged from that contained in the 1979 Code. See, Article 5-501 (1979 Code).
- (2) The principal reasons supporting this selection procedure for Architectural and Engineering Services are the lack of a definitive scope of work for such services at the time the selection is made and the importance of selecting the best-qualified firm. In general, the architect-engineer or land surveyor is engaged to represent the [State's] interests and is, therefore, in a different relationship with the [State] from that normally existing in a buyer-seller situation. For these reasons, the qualifications, competence, and availability of the three most qualified architect-engineers or land surveying firms are considered initially, and price negotiated later.
- (3) It is considered more desirable to make the qualification selection first and then to discuss the price because both parties need to review in detail what is involved in the work (for example, estimates of man-hours, personnel costs, and alternatives that the architect-engineer or land surveyor should consider in depth). Once parameters have been fully discussed and understood and the architect-engineer or land surveyor proposes a fee for the work, the recommended procedure requires the [State] to make its own evaluation and judgment as to the reasonableness of the fee.
- (4) If the fee is fair and reasonable, award is made without consideration of proposals and fees of other competing firms. If the fee cannot be negotiated to the satisfaction of the [State], negotiations with other qualified firms are initiated. Thus price clearly is an important factor in the award of the Architectural and Engineering Services contract under this procedure. The principal difference between the recommended procedure for architect-engineer and land surveyor selection and the procedures used in most other competitive source selections is the point at which price is considered.
- (5) If an enacting jurisdiction desires to use a different selection process, then it may consider the following language:

"The Procurement Officer shall negotiate with the highest qualified firms for a contract for Architectural and Engineering Services at compensation which the Procurement Officer determines in writing to be fair and reasonable to the [State]. In making such determination, the Procurement Officer shall take into account, in the following order of importance, the professional competence of offerors, the technical merits of offers, and the price for which the services are to be rendered."

Part C-Bonds, Insurance, Guarantees

§5-301 Bid Security.

(1) *Requirement for Bid Security.* Bid security shall be required for all competitive sealed bidding for construction contracts in a design-bid-build procurement when the price is estimated by the Procurement Officer to exceed [\$100,000] [an amount established by regulation]. Bid security shall be a bond provided by a surety company authorized to do business in this State, or the equivalent in cash, or otherwise supplied in a form satisfactory to the [State]. Nothing herein prevents the requirement of such bonds on such contracts under [\$100,000] [the amount set by regulation] when the circumstances warrant.

(2) *Amount of Security.* Bid security shall be in an amount equal to at least [5%] of the amount of the bid.

(3) *Rejection of Bids for Noncompliance with Bid Security Requirements.* When the Invitation for Bids requires security, noncompliance requires that the bid be rejected unless, pursuant to regulations, it is determined that the bid fails to comply in a non-substantial manner with the security requirements.

(4) *Withdrawal of Bids.* After bids are opened, they shall be irrevocable for the period specified in the Invitation for Bids (except as provided for bids in Section 3-202(6)). If a bidder is permitted to withdraw its bid (or proposal) before award, or is excluded from the competition before award, no action shall be had against the bidder or the bid security.

§5-302 Contract Performance and Payment Bonds

(1) *When Required -- Amounts.* When a construction, design-build, design-build-operate-maintain, or design-build-finance-operate-maintain contract is awarded in excess of [\$100,000], the following bonds or security shall be delivered to the [State] and shall become binding on the parties upon the execution of the contract:

(a) a performance bond satisfactory to the [State], executed by a surety company authorized to do business in this State or otherwise secured in a manner satisfactory to the [State], in an amount equal to 100% of the portion of the contract price that does not include the cost of operation, maintenance, and finance; and

(b) a payment bond satisfactory to the [State], executed by a surety company authorized to do business in this State or otherwise secured in a manner satisfactory to the [State], for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the construction work provided for in the contract. The bond shall be in an amount equal to 100% of the portion of the contract price that does not include the cost of operation, maintenance, and finance.

COMMENTARY:

The intent is to continue the requirement expressed in the 1979 version of the Code that surety bonds be provided to secure the faithful performance of construction associated with infrastructure facilities, as well as the faithful payment of suppliers and subcontractors, irrespective of project delivery method. Paragraph (b) confirms that the surety bonds are to be provided from reputable sureties authorized to do business in the [State]. Regulations requiring sureties to be listed on the U.S. Treasury list may be one appropriate vehicle for accomplishing this goal.

(2) *Reduction of Bond Amounts.* Regulations may authorize the Chief Procurement Officer or head of a Purchasing Agency to reduce the amount of performance and payment bonds to [50%] of the amounts established in Subsection (1) of this Section.

(3) *Authority to Require Additional Bonds.* Nothing in this Section shall be construed to limit the authority of the [State] to require a performance bond or other security in addition to such bonds, or in circumstances other than specified in Subsection (1) of this Section.

(4) *Suits on Payment Bonds--Right to Institute.* Every person who has furnished labor or material to the contractor or its subcontractors for the work provided in the contract, in respect of which a payment bond is furnished under this Section, and who has not been paid in full therefor before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by such person or material was furnished or supplied by such person for which such claim is made, shall have the right to sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action for the sum or sums justly due such person; provided, however, that any person having a direct contractual relationship with a subcontractor of the contractor, but no contractual relationship express or implied with the contractor furnishing said payment bond, shall have a right of action upon the payment bond upon giving written notice to the contractor within 90 days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material upon which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be personally served or served by other form of receipted transmittal that confirms actual delivery to the contractor at any place the contractor maintains an office or conducts its business.

(5) *Suits on Payment Bonds--Where and When Brought.* Every suit instituted upon a payment bond shall be brought in a court of competent jurisdiction for the county or district in which the construction contract was to be performed, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by the person bringing suit. The obligee named in the bond need not be joined as a party in any such suit.

COMMENTARY:

The provision of this Section with respect to suits on payment bonds essentially follows the Miller Act, 40 U.S.C. §270 (1970), and many similar State statutes. The language is unchanged in all material respects from Section 5-302 of the 1979 Code, except that subparagraph (4) is amended to authorize notice to be given by any method that produces a receipted transmittal, including registered mail, certified mail, overnight mail, or overnight delivery service.

§5-303 Bond Forms and Copies.

(1) *Bond Forms.* The [Policy Office] [State] shall promulgate by regulation the form of the bonds required by this Part.

(2) *Certified Copies of Bonds.* Any person may request and obtain from the [State] a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be prima facie evidence of the contents, execution, and delivery of the original.

§5-304 Errors and Omissions Insurance

Regulations shall be promulgated that specify when the Chief Procurement Officer or head of a Purchasing Agency shall require offerors to provide appropriate errors and omissions

insurance to cover architectural and engineering services under the project delivery methods set forth in Section 5-201 (1) (a), (c), (d), and (e).

COMMENTARY:

Section 5-304 is new to the revised Code. The intent of this provision is to provide flexibility to procurement officials in requiring offerors to provide appropriate errors and omissions insurance with respect to the design component of any of the four delivery methods authorized in Section 5-201 which include professional design services. Errors and omissions insurance may be of increased importance in the project delivery methods which integrate design and construction (design-build, design-build-operate-maintain, design-build-finance-operate-maintain), particularly when the successful offeror is a joint venture or special purpose corporation formed particularly for the instant project. The inclusion of the public owner as a named insured on the errors and omissions policy furnished to the contractor by the designer may be a prudent procurement strategy.

§5-305 Other Forms of Security

Regulations shall be promulgated authorizing the Chief Procurement Officer or head of a Purchasing Agency to require a Request for Proposals to include one or more of the following forms of security to assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately, or as one element of design-build-operate-maintain or design-build-finance-operate-maintain services:

- (1) Operations period surety bonds that secure the performance of the contractor's operations and maintenance obligations under the project delivery methods set forth in Section 5-201 (1) (b), (d) and (e);
- (2) Letters of credit in an amount appropriate to cover the cost to the [Agency] of preventing infrastructure service interruptions for a period up to twelve months under the project delivery methods set forth in Section 5-201 (1) (b), (d) and (e); and
- (3) Appropriate written guarantees from the contractor (or depending upon the circumstances, from parent corporations) to secure the recovery of reprocurement costs to the [State] in the event of a default in performance by the contractor.

COMMENTARY:

Section 5-305 is new to the revised Code. Design-build-operate-maintain, design-build-finance-operate-maintain, and pure operations and maintenance contracts will likely require separate forms of security to assure contract performance of infrastructure services that complies with contract requirements and is uninterrupted, even in the event of contractor default. A letter of credit setting aside immediately available funds in the event of a contractor default provides ready assurance to the government that emergency cash funds will be available to continue service if contractor termination and reprocurement is necessary. A corporate guarantee may be advisable in situations where the apparent successful bidder is a joint venture, or a special purpose entity formed only to provide the procured service. Corporate or parent corporation guarantee(s) may be required to secure the payment of reprocurement costs over and above the limits already secured by operations period bonds and letters of credit.

Part D- Contract Clauses and Fiscal Responsibility

§5-401 Contract Clauses and Their Administration.

(1) *Contract Clauses.*

Regulations shall be promulgated requiring the inclusion in [State] contracts issued under this Article 5 of clauses providing for adjustments in prices, time of performance, or other contract provisions, as appropriate, and covering the following subjects:

- (a) the unilateral right of the [State] to order in writing:
 - (i) changes in the work within the scope of the contract; and
 - (ii) changes in the time of performance of the contract that do not alter the scope of the contract work;

(b) variations occurring between estimated quantities of work in a contract and actual quantities;

(c) suspension of work ordered by the [State]; and

(d) site conditions differing from those indicated in the contract, or ordinarily encountered, except that differing site conditions clauses promulgated by the [Policy Office] [Chief Procurement Officer] need not be included in a contract:

(i) when the contract is negotiated;

(ii) when the contractor provides the site or design; or

(iii) when the parties have otherwise agreed with respect to the risk of differing site conditions.

COMMENTARY:

(1) This language is unchanged from Section 5-401(1) of the 1979 Code. The addition of four new delivery methods - operations and maintenance, design-build, design-build-operate-maintain, and design-build-finance-operate-maintain - does not eliminate the need for regulations that incorporate standard contract clauses. The Changes, Suspension of Work, and Variations clauses are standard mechanisms for government to maintain flexibility, and should be applicable to all procurement methods in Article 5. The principles underlying the Differing Site Conditions clause still apply to the design-bid-build process, and may apply to the negotiated processes (design-build, design-build-operate-maintain, design-build-finance-operate-maintain), depending upon the government's structuring of the competition. Procurement officials may properly decide to collect and furnish subsurface information to prospective offerors, with the intent of asking those offerors to rely on the information furnished in submitting offers. In such circumstances, a standard Differing Site Conditions clause is appropriate.

(2) The phrase "or other contract provisions" of this Section is not intended to alter the price adjustment provisions set forth in Subsection (2) of this Section. This Subsection is intended to enable the parties to deal with the effects of changes, variations in estimated quantities, suspensions of work, and differing site conditions on matters other than price or time for performance. For example, where a change order revises the specification, not only price or time for performance may be affected, but other terms or conditions such as insurance or inspection may also be affected.

(2) Price Adjustments.

(a) Adjustments in price pursuant to clauses promulgated under Subsection (1) of this Section shall be computed in one or more of the following ways:

(i) by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;

(ii) by unit prices specified in the contract or subsequently agreed upon;

(iii) by the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;

(iv) in such other manner as the contracting parties may mutually agree; or

(v) in the absence of agreement by the parties, by a unilateral determination by the [State] of the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as computed by the [State] in accordance with applicable sections of the regulations promulgated under Article 7 (Cost Principles) and subject to the provisions of Article 9 (Legal and Contractual Remedies).

(b) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of Section 3-403 (Substantiation of Offered Prices).

(3) Additional Contract Clauses.

Regulations shall be promulgated requiring the inclusion in [State] construction contracts of clauses providing for appropriate remedies and covering the following subjects:

- (a) liquidated damages as appropriate;
- (b) specified excuses for delay or nonperformance;
- (c) termination of the contract for default; and
- (d) termination of the contract in whole or in part for the convenience of the [State].

(4) *Modification of Required Clauses.*

The Chief Procurement Officer or the head of a Purchasing Agency may vary the clauses promulgated by the [Policy Office] [Chief Procurement Officer] under Subsection (1) and Subsection (3) of this Section for inclusion in any particular [State] construction contract, provided that any variations are supported by a written determination that states the circumstances justifying such variations, and provided that notice of any such material variation be stated in the Invitation for Bids or Request for Proposals.

COMMENTARY:

- (1) The language is unchanged in all material respects from Sections 5-401 (2) through (4) of the 1979 Code. This Section directs the [Policy Office] [Chief Procurement Officer] to promulgate contract clauses that call for adjustment of price, time for performance, or other contract provisions as appropriate with respect to situations that continually develop on construction projects. It does not require these situations to be treated in any particular way, but it does require that they be anticipated and addressed.
- (2) Subsection (2) permits price adjustments pursuant to any clauses promulgated under Subsection (1) to be determined in accordance with the contract terms or by agreement. Absent an agreement, the Procurement Officer will make a unilateral determination of the price adjustment which is subject to appeal under Article 9 (Legal and Contractual Remedies).
- (3) In using unit prices it must be remembered that great variations in the number of units required may necessitate adjustments in the unit price.
- (4) Other clauses not normally subject to the pricing formulas of Subsection (2) are also required to be included in the contract as appropriate by Subsection (3).

§5-402 Fiscal Responsibility.

Every contract modification, change order, or contract price adjustment under a construction contract with the [State] in excess of [\$ ____] shall be subject to prior written certification by the fiscal officer of the entity responsible for funding the project or the contract, or other official responsible for monitoring and reporting upon the status of the costs of the total project budget or contract budget, as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or the total contract budget. In the event that the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget and/or the total contract budget, the Procurement Officer shall not execute or make such contract modification, change order, or adjustment in contract price unless sufficient funds are available therefor, or the scope of the project or contract is adjusted so as to permit the degree of completion that is feasible within the total project budget and/or total contract budget as it existed prior to the contract modification, change order, or adjustment in contract price under consideration; provided, however, that with respect to the validity, as to the contractor, of any executed contract modification, change order, or adjustment in contract price which the contractor has reasonably relied upon, it shall be presumed that there has been compliance with the provisions of this Section.

ARTICLE 6 – MODIFICATION AND TERMINATION OF CONTRACTS FOR SUPPLIES AND SERVICES

§6-101 Contract Clauses and Their Administration.

- (1) *Contract Clauses.* The [Policy Office] [Chief Procurement Officer] may promulgate regulations permitting or requiring the inclusion of clauses providing for adjustments in prices, time of performance, or other contract provisions as appropriate covering the following subjects:
 - (a) the unilateral right of the [State] to order in writing:
 - (i) changes in the work within the scope of the contract; and
 - (ii) temporary stopping of the work or delaying performance; and
 - (b) variations occurring between estimated quantities of work in a contract and actual quantities.

COMMENTARY:

The phrase "or other contract provisions" of this Subsection is not intended to alter the price adjustment provisions set forth at Subsection (2) of this Section. It is intended to enable the parties to deal with the effects of changes, temporary work stoppages, and variations in estimated quantities. For example, where a change order requires the delivery of alternate products, not only price or time of performance may be affected, but other terms or conditions such as insurance or inspection may be affected.

- (2) *Price Adjustments.*
 - (a) Adjustments in price pursuant to clauses promulgated under Subsection (1) of this Section shall be computed in one or more of the following ways:
 - (i) by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
 - (ii) by unit prices specified in the contract or subsequently agreed upon;
 - (iii) by the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;
 - (iv) in such other manner as the contracting parties may mutually agree; or
 - (v) in the absence of agreement by the parties, by a unilateral determination by the [State] of the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as computed by the [State] in accordance with applicable sections of the regulations promulgated under Article 7 (Cost Principles) and subject to the provisions of Article 9 (Legal and Contractual Remedies).

- (b) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of Section 3-403 (Cost or Pricing Data).
- (3) *Additional Contract Clauses.* The [Policy Office] [Chief Procurement Officer] may promulgate regulations including, but not limited to, regulations permitting or requiring the inclusion in [State] contracts of clauses providing for appropriate remedies and covering the following subjects:
 - (a) liquidated damages as appropriate;
 - (b) specified excuses for delay or nonperformance;
 - (c) termination of the contract for default; and
 - (d) termination of the contract in whole or in part for the convenience of the (State).
- (4) *Modification of Clauses.* The Chief Procurement Officer or the head of a Purchasing Agency may vary the clauses promulgated by the [Policy Office] [Chief Procurement Officer] under Subsection (1) and Subsection (3) of this Section for inclusion in any particular [State] contract; provided that any variations are supported by a written determination that states the circumstances justifying such variation and provided that notice of any such material variation be stated in the Invitation for Bids or Request for Proposals.

COMMENTARY:

- (1) This Section permits the [Policy Office] [Chief Procurement Officer] to promulgate contract clauses covering situations that frequently develop. It does not require these situations to be treated in any particular way.
- (2) Subsection (2) permits price adjustments to be determined in accordance with the contract terms or by agreement. Absent an agreement, the Procurement Officer will make a unilateral determination of the price adjustment which is subject to appeal under Article 9 (Legal and Contractual Remedies).
- (3) In using unit prices it must be remembered that great variations in the number of units required may necessitate adjustments in the unit price.
- (4) Other useful clauses not normally subject to the pricing formulas of Subsection (2) may be promulgated under Subsection (3).

DEFINITIONAL CROSS-REFERENCES:

"Chief Procurement Officer"	Section	1-301(3)
"Contract"	Section	1-301(5)
"Contractor"	Section	1-301(7)
"Data"	Section	1-301(8)
"May"	Section	1-301(14)
"Regulation"	Section	1-301(20)
"Shall"	Section	1-301(22)
"Written" or "In Writing"	Section	1-301(26)

ARTICLE 7-COST PRINCIPLES**§7-101 Cost Principles Regulations Required.**

The [Policy Office] [Chief Procurement Officer] shall promulgate regulations setting forth cost principles which shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions which provide for the reimbursement of costs, provided that if a written determination is approved at a level above the Procurement Officer, such cost principles may be modified by contract.

COMMENTARY:

- (1) The cost principles regulations may be authorized for use by [State] officials as guidelines: when negotiating estimated costs or fixed prices; when the absence of open market competition precludes the use of competitive sealed bidding; when negotiating adjustments for [State]-directed changes or modifications in contract performance; when negotiating settlements of contracts which have been terminated; or as appropriate in other situations where the determination of estimated or incurred costs is involved. They should not be construed as establishing requirements to be used when negotiating. In such negotiations, the basic consideration should be whether the cost information used to determine prices, adjustments, and settlements is based on generally accepted accounting principles.
- (2) In cost-reimbursement contracts the cost principles may be modified by contract as a matter of legislative right.
- (3) The authority to promulgate regulations conferred in Section 2-102 (Authority and Duties of the Policy Office) or Section 2-204 (Authority of the Chief Procurement Officer) includes the power to promulgate regulations providing for price analysis and using cost principles for guidance in negotiations, adjustments, and settlements.

DEFINITIONAL CROSS-REFERENCES:

"Contract"	Section	1-301(5)
"May"	Section	1-301(14)
"Regulation"	Section	1-301(20)
"Shall"	Section	1-301(22)

ARTICLE 8--SUPPLY MANAGEMENT**Part A-Definitions****§8-101 Definitions of Terms Used in this Article.**

- (1) *Excess Supplies* means any supplies other than expendable supplies having a remaining useful life but which are no longer required by the Using Agency in possession of the supplies.
- (2) *Expendable Supplies* means all tangible supplies other than nonexpendable supplies.
- (3) *Nonexpendable Supplies* means all tangible supplies having an original acquisition cost of over (\$100] per unit and a probable useful life of more than one year.
- (4) *Supplies* means, for purposes of this Article, supplies owned by the [State]. (See Section 1-301(21) (Supplies)).
- (5) *Surplus Supplies* means any supplies other than expendable supplies no longer having any use to the [State]. This includes obsolete supplies, scrap materials, and nonexpendable supplies that have completed their useful life cycle.

DEFINITIONAL CROSS-REFERENCES:

"Chief Procurement Officer"	Section	1-301(3)
"Employee"	Section	1-301(10)
"Regulation"	Section	1-301(18)
"Shall"	Section	1-301(20)
"Using Agency"	Section	1-301(22)

Part B-Regulations Required**§8-201 Supply Management Regulations Required.**

The [Policy Office] [Chief Procurement Officer] shall promulgate regulations governing:

- (a) the management of supplies during their entire life cycle;

(b) the sale, lease, or disposal of surplus supplies by public auction, competitive sealed bidding, or other appropriate method designated by regulation, provided that no employee of the owning or disposing agency shall be entitled to purchase any such supplies; and

(c) transfer of excess supplies.

Part C-Proceeds

§8-301 Allocation of Proceeds from Sale or Disposal of Surplus Supplies.

Unless otherwise provided by law, the Chief Procurement Officer shall be empowered, pursuant to regulations, to allocate proceeds from the sale, lease, or disposal of surplus supplies.

ARTICLE 9 -- LEGAL AND CONTRACTUAL REMEDIES

COMMENTARY:

- (1) The American Bar Association notes that the North American Free Trade Agreement and the World Trade Organization Government Procurement Agreement, to which the United State is a signatory, require "sub-units" of national government (state and local governments) to have an appropriate bid protest procedure.
- (2) Nothing in this Article is intended to preclude the use of alternative dispute resolution methods in the resolution of procurement related disputes, or in the use of contract clauses that provide for the avoidance, negotiation, or mediation of disputes.

Part A-Pre-Litigation Resolution of Controversies

§9-101 Authority to Resolve Protested Solicitations and Awards.

- (1) *Right to Protest.* Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the Chief Procurement Officer or the head of a Purchasing Agency. The protest shall be submitted in writing within [14 days] after such aggrieved person knows or should have known of the facts giving rise thereto.
- (2) *Authority to Resolve Protests.* The Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer shall have the authority, prior to the commencement of an action in court concerning the controversy, to settle and resolve a protest of an aggrieved bidder, offeror, or contractor, actual or prospective, concerning the solicitation or award of a contract. This authority shall be exercised in accordance with regulations promulgated by the [Policy Office] [Chief Procurement Officer].
- (3) *Decision.* If the protest is not resolved by mutual agreement, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer shall promptly issue a decision in writing. The decision shall,
 - (a) state the reasons for the action taken; and
 - (b) inform the protestant of its right to judicial *or administrative * review as provided in this Article.
- (4) *Notice of Decision.* A copy of the decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the protestant and any other party intervening.
- (5) *Finality of Decision.* A decision under Subsection (3) of this Section shall be final and conclusive, unless fraudulent, or:
 - (a) any person adversely affected by the decision commences an action in court in accordance with Section 9-401(1) (Waiver of Sovereign Immunity in Connection with Contracts, Solicitation and Award of Contracts); or
 - (b) *any person adversely affected by the decision appeals administratively to the Procurement Appeals Board in accordance with Section 9-506 (Protest of Solicitations or Awards).*
- (6) *Stay of Procurements During Protests.* In the event of a timely protest under Subsection (1) of this Section, under Section 9-401(1)(Waiver of Sovereign

Immunity in Connection with Contracts, Solicitation and Award of Contracts), or under * Section 9-505 (Jurisdiction of Procurement Appeals Board);* the [State] shall not proceed further with the solicitation or with the award of the contract until the Chief Procurement Officer, after consultation with the head of the Using Agency or the head of a Purchasing Agency, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the [State].

- (7) *Entitlement to Costs.* In addition to any other relief, when a protest is sustained and the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror shall be entitled to the reasonable costs incurred in connection with the solicitation, including bid preparation costs other than attorney's fees.

COMMENTARY:

- (1) It is essential that bidders, offerors, and contractors have confidence in the procedures for soliciting and awarding contracts. This can best be assured by allowing an aggrieved person to protest the solicitation, award, or related decision. This Section and Section 9-506 (Protest of Solicitations or Awards) would permit actual or prospective bidders or offerors, or contractors, to:
- (a) promptly protest the solicitation or award to the procurement officials;
 - (b) promptly seek relief in the State courts; or
 - (c) have the protest decision reviewed by the Procurement Appeals Board provided in Part F, if enacted.
- (2) Nothing in this Section is intended to affect the power of the [Attorney General] to settle actions pending before the Procurement Appeals Board or the courts.
- (3) Whether or not citizen or taxpayer remedies would be available would be controlled by existing local law.
- (4) In general, the filing of a protest should halt the procurement until the controversy is resolved. In order to allow essential governmental functions to continue, Subsection (6) provides that the [State] may proceed with the solicitation or award of the contract, despite the protest, upon a determination in writing by the Chief Procurement Officer or the head of the Purchasing Agency that such action is necessary. It is expected that such a determination will occur only in those few circumstances where it is necessary to protect a substantial interest of the [State].
- (5) The award of costs under Subsection (7) is intended to compensate a party for reasonable expenses incurred in connection with a solicitation for which that party was wrongfully denied a contract award. No party can recover profits which it anticipates would have been made if that party had been awarded the contract. Attorney's fees associated with the filing and prosecution of the protest are not recoverable.
- (6) Note that new definitions of "electronic," "signature," "public notice," and "written" or "in writing" contained in 1-301 will permit notices, decisions, and filings to be issued or made electronically.

§9-102 Authority to Debar or Suspend.

- (1) *Authority.* After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Chief Procurement Officer or the head of a Purchasing Agency, after consultation with the Using Agency and the [Attorney General], shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than [three years]. The same officer, after consultation with the Using Agency and the [Attorney General], shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension shall not be for a period exceeding [three months]. The authority to debar or suspend shall be exercised in accordance with regulations.

COMMENTARY:

* Asterisked language to be enacted if Article 9, Part E (Procurement Appeals Board) is enacted.

- (1) It is intended that the Attorney General or equivalent legal officer in the enacting jurisdiction will be consulted concerning any proposed suspension or debarment.
- (2) The National Association of State Procurement Officials suggests that regulations provide the option to debar a person from doing business with one or more agencies, or all agencies. It also recommends that regulations permit debarment to be limited to units within a corporation, as appropriate.

- (2) *Causes for Debarment or Suspension.* The causes for debarment or suspension include the following:
- (a) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
 - (b) conviction under State or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a [State] contractor;
 - (c) conviction under State or federal antitrust statutes arising out of the submission of bids or proposals,
 - (d) violation of contract provisions, as set forth below, of a character which is regarded by the Chief Procurement Officer or the head of a Purchasing Agency to be so serious as to justify debarment action:
 - (i) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or
 - (ii) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;
 - (e) any other cause the Chief Procurement Officer or the head of a Purchasing Agency determines to be so serious and compelling as to affect responsibility as a [State] contractor, including debarment by another governmental entity for any cause listed in regulations; and
 - (f) for violation of the ethical standards set forth in Article 12 (Ethics in Public Contracting).
- (3) *Decision.* The Chief Procurement Officer or the head of a Purchasing Agency shall issue a written decision to debar or suspend. The decision shall:
- (a) state the reasons for the action taken; and
 - (b) inform the debarred or suspended person involved of its rights to judicial * or administrative * review as provided in this Article.
- (4) *Notice of Decision.* A copy of the decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening.

- (5) *Finality of Decision.* A decision under Subsection (3) of this Section shall be final and conclusive, unless fraudulent, or
- (a) the debarred or suspended person commences an action in court in accordance with Section 9-403(2) (Waiver of Sovereign Immunity in Connection with Contracts, Debarment or Suspension); or
 - (b) * the debarred or suspended person appeals administratively to the Procurement Appeals Board in accordance with Section 9-507 (Suspension or Debarment Proceedings).*

* Language between asterisks to be enacted if Article 9, Part E (Procurement Appeals Board) is enacted.

§9-103 Authority to Resolve Contract and Breach of Contract Controversies.

- (1) *Applicability.* This Section applies to controversies between the [State] and a contractor and which arise under, or by virtue of, a contract between them. This includes without limitation controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.
- (2) *Authority.* The Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer is authorized, prior to commencement of an action in a court concerning the controversy, to settle and resolve a controversy described in Subsection (1) of this Section. This authority shall be exercised in accordance with regulations,
- (3) *Decision.* If such a controversy is not resolved by mutual agreement, the Chief Procurement Officer, the head of a Purchasing Agency, or the designee of either officer shall promptly issue a decision in writing. The decision shall:
 - (a) state the reasons for the action taken; and
 - (b) inform the contractor of its right to judicial * or administrative * review as provided in this Article.
- (4) *Notice of Decision.* A copy of the decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the contractor.
- (5) *Finality of Decision.* The decision under Subsection (3) of this Section shall be final and conclusive, unless fraudulent, or:
 - (a) the contractor commences an action in court in accordance with Section 9-401(3) (Waiver of Sovereign Immunity in Connection with Contracts, Actions Under Contracts or for Breach of Contract); or
 - (b) * the contractor appeals administratively to the Procurement Appeals Board in accordance with Section 9-508 (Contract and Breach of Contract Controversies). *
- (6) *Failure to Render Timely Decision.* If the Chief Procurement Officer, the head of a Purchasing Agency, or the designee of either officer does not issue the written decision required under Subsection (3) of this Section within [120 days] after written request for a final decision, or within such longer period as

may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

* Language between asterisks to be enacted if Article 9, Part E (Procurement Appeals Board) is enacted.

COMMENTARY:

- (1) The word "controversy" is meant to be broad and all-encompassing. It includes the full spectrum of disagreements from pricing of routine contract changes to claims of breach of contract.
- (2) Subsection (2) gives the Chief Procurement Officer and any Purchasing Agencies the authority to settle all contract claims and controversies prior to the filing of a suit. This may avoid unnecessary litigation and often is essential for fair treatment of parties contracting with the [State]. On the other hand, some safeguards are needed. Limitations upon the power to settle, including prerequisite approvals, should be established by appropriate regulation.
- (3) It is important that administrative action upon claims be expeditious. Subsection (6) recognizes, however, that there can be complicated problems which require a considerable time for good faith investigation and negotiation, and that often claimants do not submit adequate documentation in support of their claims.

Part B -- Solicitations or Awards in Violation of Law

§9-201 Applicability of this Part.

The provisions of this Part apply where it is determined administratively, or upon administrative or judicial review, that a solicitation or award of a contract is in violation of law.

§9-202 Remedies Prior to an Award.

If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:

- (a) cancelled; or
- (b) revised to comply with the law.

§9-203 Remedies After an Award.

If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

- (a) if the person awarded the contract has not acted fraudulently or in bad faith:
 - (i) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the [State]; or
 - (ii) the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.
- (b) if the person awarded the contract has acted fraudulently or in bad faith:
 - (i) the contract may be declared null and void; or
 - (ii) the contract may be ratified and affirmed if such action is in the best interests of the [State], without prejudice to the [State's] rights to such damages as may be appropriate.

Part C-Interest

§9-301 Interest.

Interest on amounts ultimately determined to be due to a contractor or the [State] shall be payable at the statutory rate applicable to judgments from the date the claim arose through the date of decision or judgment, whichever is later.

Part D-Waiver of Sovereign Immunity; Limitations on Actions**§9-401 Waiver of Sovereign Immunity in Connection with Contracts.**

- (1) *Solicitation and Award of Contracts.* The [designated court or courts of the State] shall have jurisdiction over an action between the [State] and a bidder, offeror, or contractor, prospective or actual, to determine whether a solicitation or award of a contract is in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation. The [designated court or courts of the State] shall have such jurisdiction, whether the actions are at law or in equity, and whether the actions are for monetary damages or for declaratory, injunctive, or other equitable relief.
- (2) *Debarment or Suspension.* The [designated court or courts of this State] shall have jurisdiction over an action between the [State] and a person who is subject to a suspension or debarment proceeding, to determine whether the debarment or suspension is in accordance with the Constitution, statutes, and regulations. The [designated court or courts of the State] shall have such jurisdiction, whether the actions are at law or in equity, and whether the actions are for declaratory, injunctive, or other equitable relief.
- (3) *Actions Under Contracts or for Breach of Contract.* The [designated court or courts of this State] shall have jurisdiction over an action between the [State] and a contractor, for any cause of action which arises under, or by virtue of, the contract, whether the action is at law or in equity, whether the action is on the contract or for a breach of the contract, and whether the action is for monetary damages or declaratory, injunctive, or other equitable relief.
- (4) *Limited Finality for Administrative Determinations.* In any judicial action under this Section, factual or legal determinations by employees, agents, or other persons appointed by the [State] shall have no finality and shall not be conclusive, notwithstanding any contract provision, regulation, or rule of law to the contrary, except to the extent provided in:
 - (a) Section 3-701 (Finality of Determinations);
 - (b) * Section 9-506(4) (Protest of Solicitations or Awards, Standard of Review for Factual Issues); *
 - (c) * Section 9-507(4) (Suspension or Debarment Proceedings, Standard of Review for Factual Issues); and
 - (d) * Section 9-508(4) (Contract and Breach of Contract Controversies, Standard of Review for Factual Issues). *

* Language between asterisks to be enacted if Article 9, Part E (Procurement Appeals Board) is enacted.

COMMENTARY:

Where the court issues a temporary or preliminary injunction *pendente lite*, in order to protect the [State] and or successful bidder from further loss due to rising costs or other causes, the court may, under applicable local law, condition the granting of such temporary or preliminary relief upon the posting of reasonable security.

§9-402 Time Limitations on Actions.

- (1) *Protested Solicitations and Awards.* Any action under Section 9-401(1) (Waiver of Sovereign Immunity in Connection with Contracts, Solicitations and Award of Contracts) shall be initiated as follows:
 - (a) within [30] days after the aggrieved person knows or should have known of the facts giving rise to the action; or
 - (b) within [14] days after receipt of a final administrative decision pursuant to either Section 9-101(3) (Authority to Resolve Protested Solicitations and Awards, Decision) or * Section 9-506(3) (Protest of Solicitations or Awards, Decision), whichever is applicable. *
- (2) *Debarments and Suspensions for Cause.* Any action under Section 9-401(2) (Waiver of Sovereign Immunity in Connection with Contracts, Debarment or Suspension) shall be commenced within [six] months after receipt of the decision of the Chief Procurement Officer or head of a Purchasing Agency under Section 9-102(3) (Authority to Debar or Suspend, Decision), the decision of the [Ethics Commission] under Section 12-302(2)(c) (Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards, Supplemental Remedies), or * the decision of the Procurement Appeals Board under Section 9-507(3) (Suspension or Debarment Proceedings, Decision),* whichever is applicable.
- (3) *Actions Under Contracts or for Breach of Contract.* The statutory limitations on an action between private persons on a contract or for breach of contract shall apply to any action commenced pursuant to Section 9-401(3) (Waiver of Sovereign Immunity in Connection with Contracts, Actions Under Contracts or for Breach of Contract), except notice of appeals from the Procurement Appeals Board pursuant to Section 9-510(l) (Appeal and Review of Procurement Appeals Board Decisions, Appeal) concerning actions on a contract or for breach of contract shall be filed within [12] months after the date of the Procurement Appeals Board decision. *

* Language between asterisks to be enacted if Article 9, Part E (Procurement Appeals Board) is enacted.*

COMMENTARY:

- (1) The requirement that lawsuits be filed within a stipulated time is necessary to guard against stale claims and to provide the [State] with certainty regarding the extent of its liability in a particular controversy.
- (2) Some preference has been expressed for prescribing uniform limitation periods for actions under this Article. However, in contract and breach of contract actions, this Article applies the same limitations to actions involving the [State] as are applied to contract actions between private persons.

[OPTIONAL PART]

Part E -- Procurement Appeals Board

§9-501 Creation of the Procurement Appeals Board.

There is hereby established in the executive branch of this [State] a Procurement Appeals Board to be composed of a chairperson and at least two other members, but not more than [____] members. The chairperson and members of the Board shall be appointed by the [Governor], [and confirmed by the Senate], and shall serve full-time.

COMMENTARY:

(1) An independent, full time Procurement Appeals Board can provide informal, expeditious, and inexpensive procedures for the resolution of controversies. Further, creation of a Board can advance the development of a uniform set of precedents in procurement law.

(2) The size of the Board beyond the minimum of three members is left to the discretion of the [State]. It is believed that a Board should be full-time, although its members may have other duties in their job descriptions, in order to be independent and to develop the desired expertise. It is vital that the members of the Board be highly competent, fair, and impartial.

§9-502 Terms and Qualifications of Members of the Procurement Appeals Board.

- (1) *Term.* The term of office of the chairperson and each member of the Procurement Appeals Board shall be six years, except that in making the initial appointments, the [Governor] shall appoint one member for a term of two years, one member for a term of four years, and the chairperson for a term of six years, so that a term of office shall expire every two years. Thereafter, their successors shall be appointed for terms of six years, or for the balance of any unexpired term, but members may continue to serve beyond their terms until their successors take office. Members may be reappointed for succeeding terms. If there is no chairperson, or if such officer is absent or unable to serve, the senior member in length of service shall be temporary chairperson.
- (2) *Authority of the Chairperson.* The chairperson may adopt operational procedures and issue such orders, not inconsistent with this Code, as may be necessary in the execution of the Board's functions. The chairperson's authority may be delegated to the Board's members and employees, but only members of the Board may issue decisions on appeals.
- (3) *Administrative Support.* [Insert appropriate executive agency] is authorized to provide for the Board such services as the chairperson requests, on such basis, reimbursable or otherwise, as may be agreed upon between the [insert appropriate executive agency] and the chairperson.
- (4) *Qualifications for Board Membership.* The chairperson and members of the Board shall be members in good standing of the State Bar for at least five years, and experienced in contract or commercial matters.

COMMENTARY:

It is important that all the members of the Board be qualified in terms of experience and education to examine facts and apply legal principles to the controversies falling within the Board's jurisdiction.

§9-503 Rules of Procedure.

The Procurement Appeals Board shall adopt rules of procedure which, to the fullest extent possible, will provide for the expeditious resolution of controversies. The Board may adopt Small Claims Procedures for the resolution of controversies involving claims of less than [\$15,000].

§9-504 Decisions of the Procurement Appeals Board.

Acting by one or more of its members, the Procurement Appeals Board shall issue a decision in writing or take other appropriate action on each appeal submitted. A copy of any decision shall be provided to all parties and the Chief Procurement Officer or the head of a Purchasing Agency.

§9-505 Jurisdiction of the Procurement Appeals Board.

Unless an action has been initiated previously in [the designated court or courts] for essentially the same cause of action, or unless within [15] days after the action is brought before the Procurement Appeals Board, written objection is made by either the aggrieved bidder, offeror, or contractor, prospective or actual, or the [Attorney General] [Chief Procurement Officer or head of a Purchasing Agency with the concurrence of the Attorney General], the Board shall have jurisdiction to review and determine *de novo*:

- (a) any protest of a solicitation or award of a contract addressed to the Board by an aggrieved actual or prospective bidder or offeror, or a contractor; and
- (b) any appeal by an aggrieved party from a determination by the Chief Procurement Officer, the head of a Purchasing Agency, or a designee if either officer which is authorized by:
 - (i) Section 9-101 (Authority to Resolve Protested Solicitations and Awards);
 - (ii) Section 9-102 (Authority to Debar or Suspend); and
 - (iii) Section 9-103 (Authority to Resolve Contract and Breach of Contract Controversies).

§9-506 Protest of Solicitations or Awards.

- (1) *Scope.* This Section applies to:
 - (a) a protest of a solicitation or award of a contract addressed to the Procurement Appeals Board by an aggrieved actual or prospective bidder or offeror, or a contractor; and
 - (b) an appeal addressed to the Board of a decision under Section 9-101(3) (Authority to Resolve Protested Solicitations and Awards, Decision).
- (2) *Time Limitations on Filing a Protest or an Appeal.*
 - (a) For a protest under Subsection (1)(a) of this Section, the aggrieved person shall file a protest with the Board within [14] days after the aggrieved person knew or should have known of the facts and circumstances upon which the protest is based.
 - (b) For an appeal under Subsection (1)(b) of this Section, the aggrieved person shall file an appeal within [seven] days of receipt of a decision under Section 9-101(3) (Authority to Resolve Protested Solicitations and Awards, Decision).
- (3) *Decision.* On any direct protest under Subsection (1)(a) of this Section or appeal under Subsection (1)(b) of this Section, the Board shall promptly decide whether the solicitation or award was in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation. The proceeding shall be *de novo*. Any prior determinations by administrative officials shall not be final or conclusive,
- (4) *Standard of Review for Factual Issues.* A determination of an issue of fact by the Board under Subsection (3) of this Section shall be final and conclusive unless arbitrary, capricious, fraudulent, or clearly erroneous.

§9-507 Suspension or Debarment Proceedings.

- (1) *Scope.* This Section applies to a review by the Procurement Appeals Board of a decision under Section 9-102 (Authority to Debar or Suspend).
- (2) *Time Limitation on Filing an Appeal.* The aggrieved person shall file its appeal with the Board within [60] days of the receipt of a decision under Section 9-102(3) (Authority to Debar or Suspend, Decision).
- (3) *Decision.* The Board shall promptly decide whether, or the extent to which, the debarment or suspension was in accordance with the Constitution, statutes, regulations, and the best interests of the [State], and was fair. The proceeding shall be *de novo*. Any prior determinations by administrative officials shall not be final or conclusive.
- (4) *Standard of Review for Factual Issues.* A determination of an issue of fact by the Board under Subsection (3) of this Section shall be final and conclusive unless arbitrary, capricious, fraudulent, or clearly erroneous.

§9-508 Contract and Breach of Contract Controversies.

- (1) *Scope.* This Section applies to a review by the Procurement Appeals Board of a decision under Section 9-103 (Authority to Resolve Contract and Breach of Contract Controversies).
- (2) *Time Limitation on Filing an Appeal.* The aggrieved contractor shall file its appeal with the Board within [60] days of the receipt of the decision under Section 9-103(3) (Authority to Resolve Contract and Breach of Contract Controversies, Decision).
- (3) *Decision.* The Board shall promptly decide the contract or breach of contract controversy. The proceeding shall be *de novo*. Any prior determinations by administrative officials shall not be final or conclusive.
- (4) *Standard of Review for Factual Issues.* A determination of an issue of fact by the Board under Subsection (3) of this Section shall be final and conclusive unless arbitrary, capricious, fraudulent, or clearly erroneous.

§9-509 No Finality to a Decision on an Issue of Law.

No determination by the Procurement Appeals Board on an issue of law shall be final or conclusive.

§9-510 Appeal and Review of Procurement Appeals Board Decisions.

- (1) *Appeal.* Any person receiving an adverse decision, the [State], or both may appeal from a decision by the Procurement Appeals Board to the [designated court or courts of the State].
- (2) *Authorization of Appeal by the [State].* No such appeal shall be made by the [State] unless recommended by the Chief Procurement Officer or the head of the Purchasing Agency involved and approved by the [Attorney General].

§9-511 Discontinuance of Contractor's Appeal.

After notice of an appeal to the Procurement Appeals Board has been filed with the Chief Procurement Officer or the head of a Purchasing Agency, a contractor may not discontinue such appeal without prejudice, except as authorized by the Board.

[END OF OPTIONAL PART]

DEFINITIONAL CROSS-REFERENCES:

"Chief Procurement Officer"	Section	1-301(3)
"Contract"	Section	1-301(5)
"Contract Modification"	Section	1-301(6)
"Contractor"	Section	1-301(7)
"Designee"	Section	1-301(9)
"Electronic"	Section	1-301(10)
"Employee"	Section	1-301(11)
"May"	Section	1-301(14)
"Person"	Section	1-301(15)
"Purchasing Agency"	Section	1-301(19)
"Regulation"	Section	1-301(20)
"Shall"	Section	1-301(22)

ARTICLE 10 -- INTERGOVERNMENTAL RELATIONS

Part A-Definitions

§10-101 Definitions of Terms Used in this Article.

- (1) *Cooperative Purchasing* means procurement conducted by, or on behalf of, one or more Public Procurement Units, as defined in this Code.
- (2) *External Procurement Activity* means any buying organization not located in this State which, if located in this State, would qualify as a Public Procurement Unit. Agencies of the United States and of any other State in the United States of America are External Procurement Activities.
- (3) *Local Public Procurement Unit* means any county, city, town, and any other subdivision of the State or public agency of any such subdivision, public authority, educational, health, or other institution, and to the extent provided by law, any other entity which expends public funds for the procurement of supplies, services, and construction, and any nonprofit corporation operating a charitable hospital.
- (4) *Public Procurement Unit* means any one of the following:
 - (a) a Local Public Procurement Unit,
 - (b) an External Procurement Activity,
 - (c) a State Public Procurement Unit, and
 - (d) any not-for-profit entity comprised of more than one Unit or Activity listed in subparagraphs (a), (b), or (c).
- (5) *State Public Procurement Unit* means the Office of the Chief Procurement Officer of this or any other State and any other Purchasing Agency of this State or any other State.

COMMENTARY:

(1) The term "State Public Procurement Unit" in Subsection (5) relates to each entity within a State government which carries out procurement functions for the State government. In those States where procurement is completely centralized, the term "State Public Procurement Unit" refers to the centralized procurement unit of that State. In those States where procurement is partially centralized, the term "State Public Procurement Unit" describes the established primary procurement unit of the State government and such other units within the State government as are authorized to conduct procurement functions independent of the established primary State Public Procurement Unit. In those States where State procurement activities are completely decentralized, the term "State Public Procurement Unit" refers to any and all units of State government which are authorized to carry out procurement functions for the State government.

(2) The term "Local Public Procurement Unit" in Subsection (3) includes a nonprofit corporation which operates a charitable hospital. It is recognized that, in many communities, churches operate such hospitals. If church-operated hospitals are involved, and if the local doctrine of separation of State and church activities so requires, this provision may have to be removed. Similarly, some State constitutions prohibit the tending of public credit to private corporations. Such provisions would also necessitate removal of this provision from the definition set forth in Subsection (3).

(3) The term "External Procurement Activity" in Subsection (2) includes, but is not limited to, the Federal Supply Service (General Services Administration) of the United States, the Defense Logistics Agency of the United States, and any Public Procurement Unit in States other than the enacting jurisdiction.

(4) The definition of "Public Procurement Unit" is very broad. It includes any one or more of State Public Procurement Units, External Procurement Activities, and Local Public Procurement Units. It also includes any not-for-profit entity comprised of more than one such Unit or Activity.

DEFINITIONAL CROSS-REFERENCES:

"Chief Procurement Officer"	Section	1-301(31)
"Construction"	Section	1-301(41)
"Contract"	Section	1-301(5)
"Contractor"	Section	1-301(7)
"Governmental Body"	Section	1-301(11)
"Invitation for Bids"	Section	3-101(3)
"May"	Section	1-301(14)
"Purchasing Agency"	Section	1-301(19)
"Request for Proposals"	Section	3-101(5)
"Services"	Section	1-301(21)
"Shall"	Section	1-301(22)
"Specification"	Section	4-101(1)
"Supplies"	Section	1-301(24)
"Written" or "In Writing"	Section	1-301(26)

Part B-Cooperative Purchasing

§10-201 Cooperative Purchasing Authorized.

(1) Any Public Procurement Unit may either participate in, sponsor, conduct, or administer a Cooperative Purchasing agreement for the procurement of any supplies, services, or construction with one or more Public Procurement Units in accordance with an agreement entered into between the participants. Such Cooperative Purchasing may include, but is not limited to, joint or multi-party contracts between Public Procurement Units and open-ended Public Procurement Unit contracts that are made available to other Public Procurement Units.

(2) All Cooperative Purchasing conducted under this Article shall be through contracts awarded through full and open competition, including use of source selection methods substantially equivalent to those specified in Article 3 (Source Selection and Contract Formation) of this Code.

§10-202 Sale, Acquisition, or Use of Supplies by a Public Procurement Unit.

Any Public Procurement Unit may sell to, acquire from, or use any supplies belonging to another Public Procurement Unit independent of the requirements of Article 3 (Source Selection and Contract Formation) and Article 8 (Supply Management) of this Code.

§10-203 Cooperative Use of Supplies or Services.

Any Public Procurement Unit may enter into an agreement, independent of the requirements of Article 3 (Source Selection and Contract Formation) and Article 8 (Supply Management) of this Code, with any other Public Procurement Unit for the cooperative use of supplies or services under the terms agreed upon between the parties.

COMMENTARY:

Jurisdictions are increasingly joining together through cooperative purchasing arrangements to acquire common goods from single vendors. One practical effect of the success of such arrangements is that the number of public entities seeking to participate in a particular Cooperative Purchasing arrangement increases after the vendor is awarded a contract by the awarding Public Procurement Unit. The vendor may have calculated its price on the basis of a specific or reasonable "guess" of the number of transactions and the volume of goods to be sold. To ensure fairness to vendors and to protect the viability of cooperative purchasing arrangements, awarding jurisdictions should give vendors the option to accept or reject purchase orders from purchasing entities not identified during the competition. Conversely, to maximize economies of scale, jurisdictions are encouraged to identify as many participants in a particular cooperative purchase at the outset.

§10-204 Joint Use of Facilities.

Any Public Procurement Unit may enter into agreements for the common use or lease of warehousing facilities, capital equipment, and other facilities with another Public Procurement Unit under the terms agreed upon between the parties.

§10-205 Supply of Personnel, Information, and Technical Services.

- (1) *Supply of Personnel.* Any Public Procurement Unit is authorized, in its discretion, upon written request from another Public Procurement Unit to provide personnel to the requesting Public Procurement Unit. The Public Procurement Unit making the request shall pay the Public Procurement Unit providing the personnel the direct and indirect cost of furnishing the personnel, in accordance with an agreement between the parties.
- (2) *Supply of Services.* The informational, technical, and other services of any Public Procurement Unit may be made available to any other Public Procurement Unit. The requesting Public Procurement Unit shall pay for the expenses of the services so provided, in accordance with an agreement between the parties.

[ALTERNATIVE A]

- (3) *State Information Services.* Upon request, the Chief Procurement Officer may make available to Public Procurement Units the following services, among others:
 - (a) standard forms;
 - (b) printed manuals;
 - (c) product specifications and standards;
 - (d) quality assurance testing services and methods;
 - (e) qualified products lists;
 - (f) source information;
 - (g) common use commodities listings;
 - (h) supplier pre-qualification information;
 - (i) supplier performance ratings;

- (j) debarred and suspended bidders lists;
 - (k) forms for Invitations for Bids, Requests for Proposals, Instructions to Bidders, General Contract Provisions, and other contract forms; and
 - (l) contracts or published summaries thereof, including price and time of delivery information.
- (4) *State Technical Services.* The State, through the Chief Procurement Officer, may provide the following technical services, among others:
- (a) development of products specifications;
 - (b) development of quality assurance test methods, including receiving, inspection, and acceptance procedures;
 - (c) use of product testing and inspection facilities; and
 - (d) use of personnel training programs.
- (5) *Fees.* The Chief Procurement Officer may enter into contractual arrangements and publish a schedule of fees for the services provided under Subsections (3) and (4) of this Section.

[END OF ALTERNATIVE A]

COMMENTARY:

Alternative A is specifically intended to be enacted by States who wish to extend procurement services to units of local government.

§10-206 Use of Payments Received by a Supplying Public Procurement Unit.

All payments from any Public Procurement Unit or External Procurement Activity received by a Public Procurement Unit supplying personnel or services shall be available [to the supplying Public Procurement Unit] [as authorized by law].

§10-207 Public Procurement Units in Compliance with Code Requirements.

Where the Public Procurement Unit administering a Cooperative Purchase complies with the requirements of this Code, any Public Procurement Unit participating in such a purchase shall be deemed to have complied with this Code. Public Procurement Units may not enter into a Cooperative Purchasing agreement for the purpose of circumventing this Code.

[ALTERNATIVE B]

§10-208 Review of Procurement Requirements.

To the extent possible, the Chief Procurement Officer of any Public Procurement Unit may collect information concerning the type, cost, quality, and quantity of commonly used supplies, services, or construction being procured or used by Public Procurement Units. The Chief Procurement officer may make available all such information to any other Public Procurement Unit upon request.

[END OF ALTERNATIVE B]

COMMENTARY:

Section 10-208 is primarily intended to be enacted by state governments, for the purpose of identifying appropriate groups of Public Procurement Units, either inside a single state, or among multiple states, to engage in Cooperative Purchasing efforts. Large local or regional Public Procurement Units may find it advantageous to collect such information.

Part C-Contract Controversies**§10-301 Contract Controversies.**

- (1) *Public Procurement Unit Subject to Article 9 (Legal and Contractual Remedies).*
Under a Cooperative Purchasing agreement, controversies arising between an administering Public Procurement Unit and its bidders, offerors, or contractors shall be resolved between the ordering Public Procurement Unit and the supplying bidders, offerors, or contractors in accordance with [Article 9 (Legal and Contractual Remedies)] [the [administering] [ordering] Public Procurement Unit's existing procedures].
- (2) *Public Procurement Unit Not Subject to Article 9 (Legal and Contractual Remedies).*
Any Public Procurement Unit which is not subject to Article 9 (Legal and Contractual Remedies), Part E (Procurement Appeals Board), is authorized to:
 - (a) enter into an agreement with the [State] Procurement Appeals Board [or other State administrative agency designated to resolve disputes to use such board [or agency] to resolve controversies between the Public Procurement Unit and its contractors, whether or not such controversy arose from a Cooperative Purchasing agreement; and
 - (b) enter into an agreement with another Public Procurement Unit to establish procedures or use such unit's or activity's existing procedures to resolve controversies with contractors, whether or not such controversy arose under a cooperative purchasing agreement.

COMMENTARY:

If the State does not enact the Procurement Appeals Board, this Section should be amended to refer to any administrative remedies for resolving contract disputes that the State has established and authorize the Local Public Procurement Unit to enter into an agreement to utilize those administrative remedies.

ARTICLE 11 - ASSISTANCE TO SMALL AND DISADVANTAGED BUSINESSES; FEDERAL ASSISTANCE OR CONTRACT PROCUREMENT REQUIREMENTS

Part A-Definitions**§11-101 Definitions of Terms Used in this Article.**

The [Policy Office] [Chief Procurement Officer] shall promulgate regulations establishing detailed definitions of the following terms, using, in addition to the criteria set forth in this Section, such other criteria as it may deem desirable, including the number of employees and the dollar volume of business. As used in this Article:

- (1) *Disadvantaged Business* means a small business which is owned or controlled by a majority of persons, not limited to members of minority groups, who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social disadvantages.

- (2) *Small Business* means a United States business which is independently owned and which is not dominant in its field of operation or an affiliate or subsidiary of a business dominant in its field of operation.

COMMENTARY:

It is believed that the problems of small and disadvantaged businesses are widespread and may be addressed more broadly than solely through the public procurement process. For a jurisdiction to do so effectively would perhaps require the creation of a specialized agency or division of the [State] government, such as a small business administration. In the event that the broader approach is taken, such specialized governmental body should be given the authority to promulgate regulations defining the terms "small business" and "disadvantaged business".

DEFINITIONAL CROSS-REFERENCES:

"Business"	Section	1-301(1)
"Chief Procurement Officer"	Section	1-301(3)
"Contract"	Section	1-301(5)
"May"	Section	1-301(14)
"Person"	Section	1-301(15)
"Procurement"	Section	1-301(16)
"Regulation"	Section	1-301(20)
"Shall"	Section	1-301(22)
"Written" or "In Writing"	Section	1-301(26)

Part B-Assistance to Small and Disadvantaged Businesses

§11-201 Statement of Policy and Its Implementation.

- (1) *Statement of Policy.* It shall be the policy of this [State] to assist small and disadvantaged businesses in learning how to do business with the [State].
- (2) *Implementation.* The Chief Procurement Officer shall implement the policy set forth in Subsection (1) of this Section in accordance with regulations under this Article.

§11-202 Mandatory Duties of the Chief Procurement Officer.

- (1) *Assistance Within [State] Agencies.* Where feasible, the Chief Procurement Officer shall provide appropriate staff who shall be responsible to the Chief Procurement Officer and who shall serve within designated [State] agencies to assist [State] small and disadvantaged businesses in learning how to do business with the [State].
- (2) *Special Publications.* The Chief Procurement Officer shall give special publicity to procurement procedures and issue special publications designed to assist small and disadvantaged businesses in learning how to do business with the [State].
- (3) *Source Lists.* The Chief Procurement Officer shall compile, maintain, and make available source lists of small and disadvantaged businesses for the purpose of encouraging procurement from small and disadvantaged businesses.
- (4) *Solicitation Mailing Lists.* To the extent deemed by such officer to be appropriate and as may be required by regulation, the Chief Procurement Officer shall include small and disadvantaged businesses on solicitation mailing lists.

- (5) *Solicitation of Small and Disadvantaged Businesses.* The Chief Procurement Officer shall assure that small and disadvantaged businesses are solicited on each procurement for which such businesses may be suited.
- (6) *Training Programs.* The Chief Procurement Officer shall develop special training programs to be conducted by the [State] to assist small and disadvantaged businesses in learning how to do business with the [State].

§11-203 Discretionary Duties of the Chief Procurement Officer.

- (1) *Bonding.* Notwithstanding other provisions of this Code, the Chief Procurement Officer may reduce the level or change the types of bonding normally required or accept alternative forms of security to the extent reasonably necessary to encourage procurement from small and disadvantaged businesses.
- (2) *Progress Payments.* The Chief Procurement Officer may make such special provisions for progress payments as such officer may deem reasonably necessary to encourage procurement from small and disadvantaged businesses.

COMMENTARY:

- (1) In reducing for small businesses the level or types of bonding normally required, the Chief Procurement Officer should take precautions to ensure that the government and any third parties will be adequately protected.
- (2) Where federal assistance or contract requirements are stricter with regard to procurement from small and disadvantaged businesses than the procedures set forth in Section 11-202 (Mandatory Duties of the Chief Procurement Officer) and Section 11-203 (Discretionary Duties of the Chief Procurement Officer), Section 11-301 (Compliance with Federal Requirements) mandates that the Chief Procurement Officer comply with those requirements when expending such funds.

§11-204 Business Assistance Offices.

The Chief Procurement Officer may establish, as such officer may deem appropriate, business assistance offices throughout the [State] to assist in carrying out the provisions of this Part.

COMMENTARY:

The providing of staff support under Section 11-202(1) (Mandatory Duties of the Chief Procurement Officer, Assistance Within [State] Agencies), will help ensure that the needs of small and disadvantaged businesses are considered during the procurement process. Establishment of business assistance offices throughout the [State], as provided in this Section, will make [State] assistance to small and disadvantaged businesses more accessible to them.

§11-205 Report to [the Policy Office and] the [Legislature].

The Chief Procurement Officer shall annually, before [insert appropriate date], report in writing to [the Policy Office and] the [legislature] concerning the awarding of contracts to small and disadvantaged businesses during the preceding fiscal year.

COMMENTARY:

To the extent practicable, the report required by this Section should include the total dollar value of awards made in the fiscal year to small and disadvantaged businesses.

Part C-Federal Assistance or Contract Procurement Requirements

§11-301 Compliance with Federal Requirements.

Where a procurement involves the expenditure of federal assistance or contract funds, the Chief Procurement Officer shall comply with such federal law and authorized regulations which are mandatorily applicable and which are not presently reflected in this Code.

COMMENTARY:

Where a [State] chooses to accept federal assistance or contract funds, this provision ensures [State] compliance with federal assistance or contract procurement requirements where they are not presently reflected in this Code. The drafters contemplate that most of the requirements falling within this provision will be socioeconomic in nature

Part D-Other Socioeconomic Procurement Programs**[Reserved]****EDITORIAL NOTE:**

A [State] enacting the Code should place any legislatively authorized socioeconomic procurement programs here.

ARTICLE 12 - ETHICS IN PUBLIC CONTRACTING**Part A-Definitions****§12-101 Definitions of Terms Used in this Article.**

- (1) *Blind Trust* means an independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in, or other dispositions of, the property subject to the trust.
- (2) *Confidential Information* means any information which is available to an employee only because of the employee's status as an employee of this [State] and is not a matter of public knowledge or available to the public on request.
- (3) *Conspicuously* means written in such special or distinctive format, print, or manner that a reasonable person against whom it is to operate ought to have noticed it.
- (4) *Direct or Indirect Participation* means involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity.
- (5) *Financial Interest* means:
 - (a) ownership of any interest or involvement in any relationship from which, or as a result of which, a person within the past [year] has received, or is presently or in the future entitled to receive, more than [\$ _____] per year, or its equivalent;
 - (b) ownership of such interest in any property or any business as may be specified by the [Ethics Commission]; or
 - (c) holding a position in a business such as an officer, director, trustee, partner, employee, or the like, or holding any position of management.
- (6) *Gratuity* means a payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received.
- (7) *Immediate Family* means a spouse, children, parents, brothers and sisters, [and such other relatives as may be designated by the Ethics Commission].

- (8) *Official Responsibility* means direct administrative or operating authority, whether intermediate or final, either exercisable alone or with others, either personally or through subordinates, to approve, disapprove, or otherwise direct [State] action.
- (9) *Purchase Request* means that document whereby a Using Agency requests that a contract be entered into for a specified need, and may include, but is not limited to, the technical description of the requested item, delivery schedule, transportation, criteria for evaluation, suggested sources of supply, and information supplied for the making of any written determination required by this Code.

COMMENTARY:

(1) Examples of a conspicuously written item within the meaning of Subsection (3) are printed heading in capitals, such as "COVENANT RELATING TO CONTINGENT FEES", or the use of a different typeface or larger typeface than other materials in proximity to the clause.

(2) In Subsection (5)(a), a dollar value of yearly entitlements has been omitted. The amount to be inserted in that subparagraph is an optional matter for enacting jurisdictions.

DEFINITIONAL CROSS-REFERENCES:

"Business"	Section	1-301(1)
"Construction"	Section	1-301(4)
"Contract"	Section	1-301(5)
"Contractor"	Section	1-301(7)
"Employee"	Section	1-301(10)
"Governmental Body"	Section	1-301(11)
"May"	Section	1-301(14)
"Person"	Section	1-301(15)
"Procurement"	Section	1-301(16)
"Regulation"	Section	1-301(20)
"Services"	Section	1-301(21)
"Shall"	Section	1-301(22)
"Specification"	Section	4-101(l)
"Supplies"	Section	1-301(24)
"Written" or "In Writing"	Section	1-301(26)

Part B-Standards of Conduct**§12-201 Statement of Policy.**

Public employment is a public trust. It is the policy of the [State] to promote and balance the objective of protecting government integrity and the objective of facilitating the recruitment and retention of personnel needed by the [State]. Such policy is implemented by prescribing essential standards of ethical conduct without creating unnecessary obstacles to entering public service.

Public employees must discharge their duties impartially so as to assure fair competitive access to governmental procurement by responsible contractors. Moreover, they should conduct themselves in such a manner as to foster public confidence in the integrity of the [State] procurement organization.

To achieve the purpose of this Article, it is essential that those doing business with the [State] also observe the ethical standards prescribed herein.

§12-202 General Standards of Ethical Conduct.

(1) *General Ethical Standards for Employees.* Any attempt to realize personal gain through public employment by conduct inconsistent with the proper discharge of the employee's duties is a breach of a public trust.

In order to fulfill this general prescribed standard, employees must also meet the specific standards set forth in: Section 12-204 (Employee Conflict of Interest); Section 12-205 (Employee Disclosure Requirements); Section 12-206 (Gratuities and Kickbacks); Section 12-207 (Prohibition Against Contingent Fees); Section 12-208 (Restrictions on Employment of Present and Former Employees); and Section 12-209 (Use of Confidential Information).

(2) *General Ethical Standards for Non-Employees.* Any effort to influence any public employee to breach the standards of ethical conduct set forth in this Section and Section 12-204 through Section 12-209 of this Article is also a breach of ethical standards.

COMMENTARY:

(1) The six specific standards of ethical conduct which must be met by employees and non-employees are incorporated into this Section. Non-employees, as well as employees, are required to meet ethical standards of conduct. Any effort by any person to influence a public employee to breach the standards of ethical conduct applicable to employees constitutes a breach of ethical standards.

(2) Some governmental agencies have adopted a practice of requiring each new employee dealing with the award or administration of governmental funds to certify that the employee has received, read, and understood the standards or conduct for governmental agencies. It is essential that those dealing with the [State] also observe the ethical standards of this Code and that procedures be implemented to make sure that contractors understand the required standards of ethical conduct.

§12-203 Criminal Sanctions.

To the extent that violations of the ethical standards of conduct set forth in this Part constitute violations of the [State Criminal Code], they shall be punishable as provided therein. Such sanctions shall be in addition to the civil remedies set forth in this Article.

§12-204 Employee Conflict of Interest.

- (1) *Conflict of Interest.* It shall be a breach of ethical standards for any employee to participate directly or indirectly in a procurement when the employee knows that:
 - (a) the employee or any member of the employee's immediate family has a financial interest pertaining to the procurement;
 - (b) a business or organization in which the employee, or any member of the employee's immediate family, has a financial interest pertaining to the procurement; or
 - (c) any other person, business, or organization with whom the employee or any member of the employee's immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement.
- (2) *Financial Interest in a Blind Trust.* Where an employee or any member of the employee's immediate family holds a financial interest in a blind trust, the employee shall not be deemed to have a conflict of interest with regard to matters pertaining to that financial interest, provided that disclosure of the existence of the blind trust has been made to the [Ethics Commission].
- (3) *Discovery of Actual or Potential Conflict of Interest, Disqualification, and Waiver.* Upon discovery of an actual or potential conflict of interest, an employee shall

promptly file a written statement of disqualification and shall withdraw from further participation in the transaction involved. The employee may, at the same time, apply to the [Ethics Commission] in accordance with Section 12-401(3) ([Ethics Commission], Waiver) for an advisory opinion as to what further participation, if any, the employee may have in the transaction.

- (4) *Notice.* Notice of this prohibition shall be provided in accordance with regulations promulgated by the [Ethics Commission].

COMMENTARY:

The term "financial interest" used in this Section is defined in Section 12-101(5).

§12-205 Employee Disclosure Requirements.

- (1) *Disclosure of Benefit Received from Contract.* Any employee who has, or obtains any benefit from, any [State] contract with a business in which the employee has a financial interest shall report such benefit to the [Ethics Commission]; provided, however, this Section shall not apply to a contract with a business where the employee's interest in the business has been placed in a disclosed blind trust.
- (2) *Failure to Disclose Benefit Received.* Any employee who knows or should have known of such benefit, and fails to report such benefit to the [Ethics Commission], is in breach of the ethical standards of this Section.
- (3) *Notice.* Notice of this requirement shall be provided in accordance with regulations promulgated by the [Ethics Commission].

§12-206 Gratuities and Kickbacks.

- (1) *Gratuities.* It shall be a breach of ethical standards for any person to offer, give, or agree to give any employee or former employee, or for any employee or former employee to solicit, demand, accept, or agree to accept from another person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter, pertaining to any program requirement or a contract or subcontract, or to any solicitation or proposal therefor.
- (2) *Kickbacks.* It shall be a breach of ethical standards for any payment, gratuity, or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier subcontractor or any person associated therewith, as an inducement for the award of a subcontract or order.
- (3) *Contract Clause.* The prohibition against gratuities and kickbacks prescribed in this Section shall be conspicuously set forth in every contract and solicitation therefor.

§12-207 Prohibition Against Contingent Fees.

- (1) *Contingent Fees.* It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure a [State] contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent for retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business.
- (2) *Representation of Contractor.* Every person, before being awarded a [State] contract, shall represent, in writing, that such person has not retained anyone in violation of Subsection (1) of this Section. Failure to do so constitutes a breach of ethical standards.
- (3) *Contract Clause.* The representation prescribed in Subsection (2) of this Section shall be conspicuously set forth in every contract and solicitation therefor.

COMMENTARY:

The proscription stated in Subsection (1) shall not be understood to prevent an attorney, an accountant, or other professional person from representing a client in the pursuit of professional duties. For example, it would not prevent an attorney from representing a client in a bid protest nor would it prevent an attorney or an accountant from entering into contract negotiations with a [State] agency. However, it would preclude a professional or any other person engaged in the actual act of soliciting or selling to the [State] from being paid on a contingent basis.

§12-208 Restrictions on Employment of Present and Former Employees.

- (1) *Contemporaneous Employment Prohibited.* Except as may be permitted by regulations or rulings of the [Ethics Commission], it shall be a breach of ethical standards for any employee who is participating directly or indirectly in the procurement process to become or be, while such an employee, the employee of any person contracting with the governmental body by whom the employee is employed. Notice of this provision shall be provided in accordance with regulations promulgated by the [Ethics Commission].
- (2) *Restrictions on Former Employees in Matters Connected with Their Former Duties.*
 - (a) *Permanent Disqualification of Former Employee Personally Involved in a Particular Matter.* It shall be a breach of ethical standards for any former employee knowingly to act as a principal, or as an agent for anyone other than the [State], in connection with any:
 - (i) judicial or other proceeding, application, request other determination;
 - (ii) contract;
 - (iii) claim; or
 - (iv) charge or controversy, in which the employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise while an employee, where the [State] is a party or has a direct and substantial interest.
 - (b) *One Year Representation Restriction Regarding Matters for Which a Former Employee Was Officially Responsible.* It shall be a breach of ethical standards for any former employee, within one year after cessation of the former employee's official responsibility, knowingly to act as a principal, or as an agent for anyone other than the [State], in connection with any:

- (i) judicial or other proceeding, application, request for a ruling, or other determination;
- (ii) contract;
- (iii) claim; or
- (iv) charge or controversy, in matters which were within the former employee's official responsibility, where the [State] is a party or has a direct or substantial interest.

COMMENTARY:

Where considered appropriate, a jurisdiction may desire to enact a more stringent provision which provides that, for a period of one year following termination of employment, an employee may not enter into any arrangement with any contractor if the employee had personally and substantially dealt with such contractor or had official responsibility concerning a contract with the contractor.

- (3) *Disqualification of Business When an Employee Has a Financial Interest.* It shall be a breach of ethical standards for a business in which an employee has a financial interest knowingly to act as a principal, or as an agent for anyone other than the [State], in connection with any:
 - (a) judicial or other proceeding, application, request for a ruling, or other determination;
 - (b) contract;
 - (c) claim; or
 - (d) charge or controversy, in which the employee either participates personally and substantially through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of the employee's official responsibility, where the [State] is a party or has a direct and substantial interest.
- (4) *Selling to the [State] After Termination of Employment is Prohibited.* It shall be a breach of ethical standards for any former employee, unless the former employee's last annual salary did not exceed [\$_____] to engage in selling or attempting to sell supplies, services, or construction to the [State] for one year following the date employment ceased.

The term "sell" as used herein means signing a bid, proposal, or contract; negotiating a contract; contacting any employee for the purpose of obtaining, negotiating, or discussing changes in specifications, price, cost allowances, or other terms of a contract; settling disputes concerning performance of a contract; or any other liaison activity with a view toward the ultimate consummation of a sale although the actual contract therefor is subsequently negotiated by another person; provided, however, that this Section is not intended to preclude a former employee from accepting employment with private industry solely because the former employee's employer is a contractor with this [State], nor shall a former employee be precluded from serving as a consultant to this [State].

COMMENTARY:

(1) This Section places restrictions on the contemporaneous employment of present employees who are involved in the procurement process. It also places permanent and temporary disqualifications on the employment of former employees.

(2) Subsection (1) provides that no employee participating directly or indirectly in the procurement process may become an employee of parties contracting with the particular governmental body in which the employee is employed except as may be permitted under [Ethics Commission] regulations. For the definition of "direct or indirect participation", Section 12-101(4) should be consulted.

(3) Subsection (2)(a) provides that former employees are permanently disqualified from knowingly acting as a principal, or agent for anyone other than the [State], in certain matters in which the employee had participated personally and substantially while employed by the [State] where the [State] is a party or has a direct and substantial interest.

(4) Under Subsection (2)(b) a former employee is also prevented from appearing for one year after cessation of the employee's official responsibility before any court, department, or agency in connection with any matter which was within the employee's official responsibility where the [State] is a party or directly and substantially interested.

(5) Subsection (3) prohibits businesses in which the employee has a financial interest from knowingly acting as principals, or as agents for anyone other than the [State], in any matters in which the [State] employee personally and substantially participates or which is the subject of the employee's official responsibility where the [State] is a party or has a direct and substantial interest. The definition of "financial interest" is found in Section 12-101(5). This provision, which applies to businesses of employees, is distinguishable from Subsection (1), which is applicable to employees themselves. Section 12-204 (Employee Conflict of Interest) is also applicable only to employees and, unlike the immediate Section which relates to employment and business arrangements, is aimed at a broader array of financial interests.

(6) Subsection (4) provides that former high-level employees above a salary level to be prescribed by the enacting jurisdiction are prohibited from selling to the [State] for one year following termination of their employment.

§12-209 Use of Confidential Information.

It shall be a breach of ethical standards for any employee or former employee knowingly to use confidential information for actual or anticipated personal gain, or for the actual or anticipated personal gain of any other person.

COMMENTARY:

The term "confidential information" is limited by its definition in Section 12-101(2) to information which is available only because of one's status as a [State] employee.

Part C-Remedies

§12-301 Civil and Administrative Remedies Against Employees Who Breach Ethical Standards.

- (1) *Existing Remedies Not Impaired.* Civil and administrative remedies against employees which are in existence on the effective date of this Code shall not be impaired.
- (2) *Supplemental Remedies.* In addition to existing remedies for breach of the ethical standards of this Article or regulations promulgated hereunder, the [Ethics Commission] may impose any one or more of the following:
 - (a) oral or written warnings or reprimands;
 - (b) suspension with or without pay for specified periods of time; and
 - (c) termination of employment.
- (3) *Right to Recovery from Employee Value Received in Breach of Ethical Standards.* The value of anything received by an employee in breach of the ethical standards of this Article or regulations promulgated hereunder shall be recoverable by the [State] as provided in Section 12-303 (Recovery of Value Transferred or Received in Breach of Ethical Standards).
- (4) *Due Process.* All procedures under this Section shall be in accordance with due process requirements and existing law. In addition, notice and an opportunity for a hearing shall be provided prior to imposition of any suspension or termination of employment.

§12-302 Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards.

- (1) *Existing Remedies Not Impaired.* Civil and administrative remedies against non-employees which are in existence on the effective date of this Code shall not be impaired.
- (2) *Supplemental Remedies.* In addition to existing remedies for breach of the ethical standards of this Article or regulations promulgated hereunder, the [Ethics Commission] may impose any one or more of the following:
 - (a) written warnings or reprimands;
 - (b) termination of transactions; and
 - (c) debarment or suspension from being a contractor or subcontractor under [State] contracts.
- (3) *Right to Recovery from Non-Employee Value Transferred in Breach of Ethical Standards.* The value of anything transferred in breach of the ethical standards of this Article or regulations promulgated hereunder by a non-employee shall be recoverable by the [State] as provided in Section 12-303 (Recovery of Value Transferred or Received in Breach of Ethical Standards).
- (4) *Right of the [State] to Debar or Suspend.* Debarment or suspension may be imposed by the [Ethics Commission] in accordance with the procedures set forth in Section 9-102 (Authority to Debar or Suspend) for breach of the ethical standards of this Article, provided that such action may not be taken without the concurrence of the [Attorney General].
- (5) *Due Process.* All procedures under this Section shall be in accordance with due process requirements, including, but not limited to, a right to notice and an opportunity for a hearing prior to imposition of any termination, debarment, or suspension from being a contractor or subcontractor under a [State] contract.

COMMENTARY:

The power to debar or suspend, with appropriate safeguards, is primarily entrusted to the Chief Procurement Officer under procedures and conditions set forth in Section 9-102 (Authority to Debar or Suspend). The supplementary and limited jurisdiction of the [Ethics Commission] to debar or suspend the violations or ethical standards is granted by Subsection (4) in the interest of providing a procedure which may be utilized in those cases where it is desirable for an outside, independent agency to proceed with debarment or suspension.

§12-303 Recovery of Value Transferred or Received in Breach of Ethical Standards.

- (1) *General Provisions.* The value of anything transferred or received in breach of the ethical standards of this Article or regulations promulgated hereunder by an employee or a non-employee may be recovered from both the employee and non-employee.
- (2) *Recovery of Kickbacks by the [State].* Upon a showing that a subcontractor made a kickback to a prime contractor or a higher tier subcontractor in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the amount thereof was included in the price of the

subcontract or order and ultimately borne by the [State] and will be recoverable hereunder from the recipient. In addition, said value may also be recovered from the subcontractor making such kickbacks. Recovery from one offending party shall not preclude recovery from other offending parties.

COMMENTARY:

The definition of "kickback" may be found in Section 12-206(2).

Part D - [Ethics Commission]**§12-401 [Ethics Commission].**

- (1) *Regulations.* The [Ethics Commission] shall promulgate regulations to implement this Article and shall do so in accordance with the applicable provisions of the [Administrative Procedure Act] of this State.

COMMENTARY:

The [Ethics Commission] may particularly wish to require disclosure of substantial political contributions of contractors under applicable State or local laws.

- (2) *Advisory Opinions.* On written request of employees or contractors, the [Ethics Commission] may render written advisory opinions regarding the appropriateness of the course of conduct to be followed in proposed transactions. Such requests and advisory opinions must be duly published in the manner in which regulations of this [State] are published. Compliance with requirements of a duly promulgated advisory opinion of the [Ethics Commission] shall be deemed to constitute compliance with the ethical standards of this Article.
- (3) *Waiver.* On written request of an employee, the [Ethics Commission] may grant an employee a written waiver from the application of Section 12-204 (Employee Conflict of Interest) and grant permission to proceed with the transaction to such extent and upon such terms and conditions as may be specified. Such waiver and permission may be granted when the interests of the [State] so require or when the ethical conflict is insubstantial or remote.

COMMENTARY:

(1) Some jurisdictions may want to use existing agencies to issue regulations pertaining to standards of ethical conduct. Other jurisdictions may wish to create a special "Ethics Commission" for this purpose. Therefore, the words "Ethics Commission" are bracketed wherever they appear in this Article.

(2) If an enacting jurisdiction chooses to create an [Ethics Commission], it will be necessary to adopt a regulation pertaining to its structure, duties, powers, and the appointment of its members.

(3) Subsection (2) authorizes an advisory opinion procedure which will provide guidance to public employees and contractors as to whether a prospective course of conduct is proper.

(4) Subsection (3) authorizes the [Ethics Commission] to waive the application of specified provisions of Article 12 to public employees when the public good will be served.

(5) If invoked, the waiver provision provides an administrative mechanism for averting the necessity of litigating such questions as whether an employee has a conflict of interest, and if so, to what extent that employee's further participation in the matter is barred. In *Graham v. McGrail*, 345 N.E.2d 888 (Mass. 1976), a dispute over such questions resulted in litigation which could have been avoided if a provision similar to Subsection (3) had been available.

§12-402 Appeal of Decisions of the [Ethics Commission].

- (1) *General.* Except as provided under Subsection (2) of this Section, a decision of the [Ethics Commission] under Section 12-301 (Civil and Administrative Remedies Against Employees Who Breach Ethical Standards) or Section 12-302 (Civil and Administrative Remedies Against Non-Employees Who Breach

Ethical Standards) shall be reviewable in accordance with the [Administrative Procedure Act] of this State.

- (2) *Debarment or Suspension.* A decision of the [Ethics Commission] regarding debarment or suspension under Section I 2-302(2)(c) (Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards, Supplemental Remedies) shall be reviewable as provided in Section 9-402(2) (Time Limitations on Actions, Debarments and Suspensions for Cause).